Supreme Court, U.S.
FILED
081564 JUN 18 2009
OFFICE OF THE CLERK

No. 08-____

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., GREATER MIAMI CHAPTER; MIAMI-DADE COUNTY STUDENT GOVERNMENT ASSOCIATION; MARK BALZLI, INDIVIDUALLY AND AS NEXT FRIEND TO HIS SON, AIDAN BALZLI,

Petitioners,

v.

MIAMI-DADE COUNTY SCHOOL BOARD; ALBERTO M. CARVALHO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS, MIAMI-DADE COUNTY PUBLIC SCHOOLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RANDALL C. MARSHALL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd., Ste. 340
Miami, Florida 33137
(786) 363-2707

JONEL NEWMAN
Counsel of Record
UNIVERSITY OF MIAMI SCHOOL OF LAW
1311 Miller Drive
Coral Gables, FL 33146
(305) 284-4125

QUESTIONS PRESENTED

In a case challenging the removal of a book from all school libraries in Miami-Dade County, the district court, after an extensive preliminary injunction hearing that included testimony from twelve witnesses, granted the injunction, based on findings rooted in credibility determinations "that the majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision."

A panel of the Eleventh Circuit reversed, refusing to accord the district court's factual findings any deference, based on its own review of the record and independent consideration of materials outside the record.

The questions presented are:

1. Whether, in a First Amendment case, the district court's findings of historical fact, motivation, intent, pretext and credibility are entitled to deference under Fed.R.Civ.P. 52(a)(6), or, as the court of appeals held, are subject to plenary review.

2. Whether the courts of appeals are required to undertake "independent review" of a trial court's factual findings when those findings *support* a holding in favor of First Amendment claims.

PARTIES TO THE PROCEEDING

Petitioners are the American Civil Liberties Union of Florida, Inc., Greater Miami Chapter; the Miami-Dade County Student Government Association; Mark Balzli; and Adian Balzli, through his next friend, Mark Balzli.

Respondents are the Miami-Dade County School Board and the Miami-Dade County Superintendent of Schools.[1]

CORPORATE DISCLOSURE STATEMENT

The nongovernmental corporation filing this Petition is the American Civil Liberties Union of Florida, Inc., a not for profit corporation. There is no parent corporation or publicly-held company owning stock in the corporation.

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[1] While Rudolph F. Crew was the Superintendent at the time this case was filed, Alberto M. Carvalho has since replaced him. Pursuant to Fed. R. Civ. P. 25(d), Mr. Carvalho is automatically substituted as a party in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the court of appeals denying *en banc* review, reprinted in the Appendix to the Petition ("App.") at 292a, is unreported. The panel opinion (App. 1a-177a) is reported as *American Civil Liberties Union of Florida, Inc., v. Miami-Dade County School Board*, 557 F.3d 1177 (11th Cir. 2009).

The district court's opinion granting a preliminary injunction (App. 178a-291a) is reported as *American Civil Liberties Union of Florida, Inc., v. Miami-Dade County School Board*, 439 F.Supp.2d 1242 (S.D. Fla. 2006).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit for which review is sought was entered on February 5, 2009. The Eleventh Circuit denied Petitioners' timely petition for rehearing *en banc* on March 27, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND COURT RULES

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fed.R.Civ.P. 52(a)(6)

Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE CASE

On June 14, 2006, the Miami-Dade County School Board voted to remove a series of children's books, including *A Visit to Cuba* and its Spanish language counterpart *Vamos a Cuba* (the "Cuba Books") from all District school libraries. Plaintiffs American Civil Liberties Union of Florida, Greater Miami Chapter, Miami-Dade Student Government Association, and Aidan and Mark Balzli (an elementary school student and his parent), sought an injunction against removal of the books claiming that the School Board's actions violated the First

Amendment.[2]

The district court required substantial briefing and held an extensive preliminary injunction hearing, taking the testimony of twelve witnesses and considering over 40 documentary exhibits.

Background Facts Established in the District Court

1. Miami-Dade County School Board rules prescribe "criteria for teachers, library media specialists, and administrators to apply in evaluating library materials," including, *inter alia*, "educational significance, appropriateness (to age, maturity, interest and learning levels), and accuracy." App. at 184a.

2. Applying these standards, school personnel in 33 Miami-Dade elementary and middle schools obtained 49 copies of the Cuba Books from 2001 to 2006. One hundred and fifty-nine copies of the Cuba Books are in public school libraries across the State of Florida. App. at 185a-186a. The Cuba Books are part of a series of children's picture books published by Heinemann Library for Children entitled "A Visit To ... ." The books are designed to provide basic information about what it's like to be a child in different countries for 4 to 8 year old readers. *Id.* at 185a.

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[2] Plaintiffs also raised a due process claim but review of that claim is not sought in this Petition.

3. On April 4, 2006, an elementary school parent filed a formal complaint requesting that the Cuba Books be removed from his child's school. The parent's complaint stated, "As a former political prisoner from Cuba, I find the material to be untruthful. It portrays a life in Cuba that does not exist." App. at 182a-183a.

4. In accordance with School Board rules, the District convened a School Materials Review Committee ("SMRC") to review the complaint. App. at 186a. Eight elementary school educators, librarians, administrators and a representative of the parent teacher student group served on the SMRC. *Id.* at 186a-187a. The SMRC voted, 7 to 1, to retain the book in the library. Six of the SMRC members expressly noted that they found the book to be apolitical in tone and content. *Id.* at 189a-190a and n. 9. "All eight SMRC members found the Book educationally significant and developmentally appropriate, and seven SMRC members found the book to meet the accuracy criteria." *Id.* at 189a.

5. While the rule-based review process was still underway, School Board member Frank Bolaños sought to dispense with the process and have the Board immediately remove the Cuba Books. He brought the following resolution before the Board, asking the School Board to:

> **PROTECT[] OUR CHILDREN FROM THE HURTFUL & INSULTING DISTORTIONS OF THE BOOK "VAMOS A CUBA" BY**

REMOVING THESE BOOKS FROM ALL OF OUR PUBLIC SCHOOL LIBRARIES.

App. at 190a. Mr. Bolaños stated that the book is "hurtful and insulting to both our Cuban-American community and those Cubans still living on the island under oppressive conditions." *Id.* He criticized the ongoing rule-based review process stating that it would not "satisfy the segment of our community that is outraged, that feels discriminated against by this book." *Id.* at 193a.

6. As the district court later found: "The ensuing School Board testimony and debate ... was characterized by repeated references to political issues and viewpoints and was sharply critical of the book for omitting negative political information about the Castro regime from its contents." App. at 192a-193a. School Board member Perez compared the book to "pornography" and books about "devil worship and other offensive things like that," which she said had no place in school libraries. *Id.* at 193a. She went on to compare *Vamos a Cuba* to books featuring "Hitler Youth, or Nazism, or the KKK Youth," and opposed the book because she viewed it as "especially damaging to the sensibilities of this community." *Id.* At the close of the debate, the School Board voted to allow the administrative process to continue to conclusion. *Id.* at 194a.

7. Upon concluding its administrative process, the SMRC transmitted its recommendation to keep the Cuba Books, and the complaining parent

exercised his right to file a formal appeal pursuant to the School Board Rule. The Superintendent then convened a 17 member District Materials Review Committee ("DMRC") to consider the appeal. App. at 194a-195a.

8. The DMRC was chaired by Deputy Superintendent Antoinette Dunbar (App. at 198a) and consisted of the Regional Center Superintendent, two elementary school principals, the Administrative Directors for Library Media Services and the Division of Social Sciences, the Instructional Supervisors for the Division of Language Arts and for Library and Media Services, the Supervisor for Instructional Materials and Textbook Services, an elementary school reading coach, two Library Media Specialists, one student, a representative of the United Teachers of Dade, a representative from the Dade County Council of Parent – Teacher / Parent – Teacher – Student Associations, a member of the Florida House of Representatives and the President of the Spanish-American League Against Discrimination (SALAD). App. at 195a. The DMRC discussed "the accuracy of the books, the sensitivity of the topic in regard to the community, and the differences between the English and Spanish text." *Id.* at 65a-66a. Much of the discussion focused on whether the accuracy of the book was affected by its alleged omissions, with the debate centering on the kind and amount of information that are appropriate in a book for very young children. *Id. See also id.* at 198a-203a.

9. Following its discussion, the DMRC voted 15 to 1 to maintain the Cuba Books in the library, and the Superintendent affirmed the decision. The parent then appealed to the School Board. App. at 203a.

10. School Board Member Bolaños submitted another proposal regarding *Vamos a Cuba* for the School Board's consideration at its June 14, 2006 meeting. The resolution called on the School Board to:

> **TEACH[] OUR CHILDREN THE TRUTH ABOUT CUBA BY REMOVING THE BOOK "VAMOS A CUBA" FROM ALL OF OUR PUBLIC SCHOOL LIBRARIES & REPLACING THEM [*sic*] WITH HISTORICALLY ACCURATE & EDUCATIONALLY RELEVANT BOOKS**

App. at 206a. Mr. Bolaños stated that "[t]his book and its errors of commission and omission should not remain in the hands and minds of innocent five to nine year old children." *Id.*

11. At the School Board meeting, members of the Board who supported removing the Cuba Books made repeated reference to how they were "offended" by the Books and faulted the Books for omitting negative references to the Castro regime. For example, at the outset of the meeting, the Chairman of the School Board, Augustin Barrera, stated that

the parent filed the complaint "because he feels that this is offensive, not only to him, but to the Cuban community." App. at 208a. Chairman Barrera continued:

> There is [*sic*] a couple of images that, you know, to the average person it's just kids in school uniforms, but to me as a Cuban, and to the Cuban American community, we see kids in uniforms and they're called the Pioneers, and that represents what is there today, which is a dictatorship of Fidel Castro. So, yes, we are offended. Even though it doesn't say anything but the cover of that book is offensive to us as a community.

Id. at 208a-209a. Board Member Tabares Hantman "opened with a statement to stand firmly in **her** 'commitment to stand with the Cuban American community, which I am a very proud member.'" *Id.* at 210a (emphasis in original). She recounted "her family's suffering" under the Castro regime and stated that her vote to remove the Cuba Books was part of "doing [her] job as a Cuban American ... ." *Id.* at 211a. The School Board voted at its June 14th meeting to remove the Cuba Books, as well as all other books in the "A Visit To ..." series, from all school libraries in the District. *Id.* at 206a-207a.

12. Plaintiffs American Civil Liberties Union of Florida, Inc., Greater Miami Chapter, and Miami-Dade County Student Government Association filed a complaint for declaratory and injunctive relief on

June 20, 2006, challenging the School Board's June 14, 2006 Order.[3] On June 27 plaintiffs filed an emergency motion for a temporary restraining order. The trial court denied the emergency motion, converted it to a motion for preliminary injunction, and set a July evidentiary hearing. At the hearing, the trial court received into evidence the conflicting and contradictory testimony of twelve witnesses and over forty exhibits. App. at 178a-180a.

District Court Findings of Fact Regarding Motivation, Intent and Pretext

On July 24, 2006, the district court granted plaintiffs' motion for a preliminary injunction, holding that the removal of the books violated the First Amendment. The district court supported this decision with findings of fact regarding the School Board's motivation for removing the Cuba Books. These findings rested on the district court's credibility determinations and its resolution of key factual disputes. Specifically, the district court found,

> based on the greater weight of the more persuasive and credible evidence at the preliminary injunction hearing, that the majority of the Miami-Dade County School Board members intended by their removal of the books to deny

[3] Plaintiffs later amended their Complaint to add Mark Balzli, individually and as next friend to his son, Aidan, an elementary school student in the School District, as additional plaintiffs. App. at 179a, 181a.

> schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision.

App. at 265a.

The district court made this finding after carefully weighing the evidence and assessing the credibility of each side's witnesses.

> The opinions expressed by the SMRC and the DMRC were supported by professionals who testified on Plaintiffs' behalf at the preliminary injunction hearing. *I find their testimony more persuasive and convincing* than other opinions offered by the Defendants' witnesses. The concern of these professionals was that the objections to the Cuba Books appear to be based on adults attempting to import an adult value system into a children's book. With regard to the claimed omissions and inaccuracies, *I find credible* the opinion of Ms. Antionette Dunbar, the Chair of the DMRC, who testified at the evidentiary hearing that: "We did not perceive those to be omissions relative to the developmental level of the text, nor the intent and purpose of this as a text for this age child."

App. at 275a (emphases added).

Expressly rejecting the School Board's contention that the Books were properly removed because more could have been said about the problems in Cuba under Fidel Castro, the district court found that:

> The more reasoned *and convincing* opinion of Plaintiffs' experts is that too much information of the kind at issue is cognitively more damaging to young children than too little ... [and] including the kind of information advocated would make the books inappropriate for young children ... .

App. at 275a-276a (emphasis added).[4]

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[4] For example, the district court did not credit the testimony of defendants' witness Dr. Lydia Usategui. Rather, the court credited the testimony of plaintiffs' expert Dr. Lisandro Perez, who opined "(1) the alleged inaccuracies ... are either of little consequence or are not properly inaccuracies but based on different interpretations of the Cuban historical and cultural reality; (2) the alleged omissions are appropriate omissions given the age level and purpose for which the book is intended; and (3) the objections and level of outrage... cannot be understood by looking strictly at the inaccuracies and omissions, but rather must be understood within the broader ideological context of exile political culture that has a long history in Miami's Cuban exile community." App. at 276a and n. 41 and n. 42. *See also id.* at 267a, n. 37 (contrasting Dr. Usategui's testimony ("the book tries to portray an image of normalcy with the theme of life growing up in Cuba as very similar to that in the U.S. This is grossly inaccurate and unacceptable.") with Dr. Perez' testimony ("The real offense of

(footnote continued ...)

Furthermore, the district court found that:

> While the debate was couched in terms of "inaccuracies" contained in the Cuba Books, the real issue was that the Cuba Books were content-neutral and scrupulously apolitical, and did not reflect, as viewed by the majority of the School Board members, the true evil of Castro's government and the oppression of the Cuban people. Thus, the majority was significantly motivated to remove the books because of their disagreement with the content-neutral views expressed in the Cuba Books ... .

App. at 265a.

After reviewing all the evidence, the district court found that the School Board was motivated to remove the Cuba Books because the Books espoused a political viewpoint with which the Board disagreed. Based on its findings that "because the majority of School Board members disagreed with [the Books'] content, or point-of-view, or because those members

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(... footnote continued)
Vamos a Cuba for many Cuban exiles is that it treats Cuba as if it were any other country. To present Cuba as a normal place is unacceptable to exiles because it negates the very reason for their exile and struggle. ... The adamant rejection of normalcy accounts for the strong desire to remove from the library shelves a book that treats Cuba as the same as any other country.")).

desired to impose upon their students a political orthodoxy to which they and their constituents adhered," App. at 241a, and that the claims of inaccuracies were pretextual, *id.* at 266a, the district court concluded that the removal of the Books violated the First Amendment. The district court therefore granted plaintiffs' request for a preliminary injunction.

Decision on Appeal

Defendants filed an interlocutory appeal with the Eleventh Circuit, which reversed the district court's grant of a preliminary injunction by a 2-1 vote. The panel majority accorded the district court's findings of historical fact, motivation, intent, pretext and credibility no deference. Instead, the appellate court found its own facts from the record and from sources outside the record. The court of appeals disregarded Rule 52(a)(6)'s clear error standard because it believed that First Amendment cases require *de novo* review of all facts "upon which the resolution of the constitutional question depends." App. at 57a. Since in this case the School Board's motive was dispositive, the Eleventh Circuit declared that findings of motivation, intent, pretext and credibility were "constitutional facts" subject to plenary review. *Id.* at 53a.

Having substituted its own factual findings for those of the trial court, the panel majority concluded that "plaintiffs' First Amendment claim does not have a substantial likelihood of success on the merits." App. at 113a. The panel majority

characterized its task as "determin[ing] 'the decisive factor' that motivated the Board," and then sought to "find the disputed 'why' facts – the motive facts – ourselves, as though the district court had never made any findings about them." *Id.* at 62a.

The majority proceeded to "find from the evidence in this record ... [that] inaccuracies were what motivated the Board ... . The stated motive was not a pretext or a guise for viewpoint discrimination." App. at 113a. In reaching this conclusion, the majority reweighed the evidence and made independent credibility determinations at odds with those of the district court – determinations that were integral to the trial court's conclusions on motivation and pretext. The panel majority found those facts independently for itself based only on its review of the cold record and independent consideration of materials outside the record.

For example, the majority "found" on appeal that "the District Committee did not fully consider evidence [a report written by Dr. Juan Clark and distributed by Dr. Usategui] that the School Board had before it concerning the inaccuracies in *Vamos a Cuba*," and inferred that this is why the District Committee incorrectly determined the book should remain in the library. App. at 66a and n. 4. The majority failed to acknowledge that all this evidence was considered by the district court, *see id.* at 199a-202a, and that credibility determinations led the district court to reject Dr. Clark's – and Dr. Usategui's – testimony and credit Dr. Perez' and DMRC Chair Dunbar's testimony regarding claims of

inaccuracy. Contrary to the district court, which had the opportunity to observe these witnesses, the panel simply chose to credit Dr. Clark's (and Dr. Usategui's) testimony and ignore the testimony of Dr. Perez and Ms. Dunbar. App. at 275a-277a and n. 41, n. 42; 83a-86a. *See also* n. 4, *supra*.

The panel majority also reweighed historical evidence and created its own record, finding historical facts about life in Cuba by utilizing and incorporating historical factual evidence that was never a part of the record below. App. at 74a-82a. The majority compared the broad, general one-sentence statements of the children's book to a 2006 U.S. State Department's Report on Cuba, and faulted the children's book for failing to include the same detailed information. *Id.* at 77a-82a and n. 10. The majority suggested that it was the information in this Report that caused the School Board to reject the Books as inaccurate. *Id.* However, the 2006 Report was never mentioned by the Board as the reason for its actions, nor was it evidence before the district court. *See also* pp. 9-13 and n. 4, *supra* (findings on inaccuracies and motivation).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

This case presents two distinct but related questions concerning the standard of review in First Amendment cases.

First, are a district court's findings on motivation, intent, pretext and credibility in a First

Amendment case entitled to deference under Fed.R.Civ.P. 52(a)(6)? The court of appeals determined that no deference was in order because the unique "independent review" requirement in First Amendment cases requires *de novo* review of all dispositive factual determinations.

Second, does the "independent review" requirement in First Amendment cases even apply to a district court's factual findings when those findings *support* a holding in favor of a First Amendment claimant?

Both questions merit this Court's review because they significantly impact First Amendment rights and jurisprudence. In the case of the first question presented, the Eleventh Circuit's decision that findings on motivation, intent, pretext and credibility in a First Amendment case are "constitutional facts" entitled to no deference on appeal is a substantial departure from the accepted and usual course of judicial proceedings that conflicts with relevant decisions of this Court. Furthermore, the circuit courts have experienced considerable confusion defining the parameters of the constitutional fact doctrine, particularly in the First Amendment context, and would benefit from a clear articulation of the doctrine from this Court. While there is variation among the circuits in defining the parameters of the constitutional fact doctrine, the Eleventh Circuit's decision in this case has created a conflict with at least two other circuits, and there are no prior First Amendment decisions that refuse to defer to the trial court's subsidiary fact-finding on

questions of credibility, resolution of conflicting historical evidence, and weight and sufficiency of the evidence in First Amendment cases.

The second question presented, whether the clearly erroneous standard of review applies to findings of fact in support of upholding First Amendment rights, has produced a significant split among the circuit courts. The Eleventh Circuit's resolution of both questions presented in this case is at odds with this Court's First Amendment and other precedents. Although these questions have arisen in the context of an appellate court's review of a preliminary injunction, the district court's factual findings are nonetheless subject to deference under Fed.R.Civ.P. 52. The evidentiary record created in the district court was extensive, the decisions on these crucial First Amendment questions are significant, and it is typical that important First Amendment issues arise in an injunctive relief setting.

A. FINDINGS ON QUESTIONS OF MOTIVATION, INTENT, PRETEXT AND CREDIBILITY IN FIRST AMENDMENT CASES ARE ENTITLED TO DEFERENCE UNDER FED.R.CIV.P. 52(a)(6).

The district court "scrutinize[d] the record to determine which is the decisive factor and the substantial motivation for the School Board's Final Order." App. at 269a. That record included the testimony of twelve witnesses and over 40 documentary exhibits. After weighing the evidence

and assessing the credibility of the witnesses, the district court found that the "decisive factor" motivating the School Board to remove the Cuba Books was "to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed," and that "the School Board's claim of 'inaccuracies' is a guise and pretext for 'political orthodoxy.'" App. at 265a-266a. Based on that finding, the district court concluded that the School Board's actions violated the First Amendment under the test enunciated in *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion).

As this Court made clear in *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985), "review of factual findings under the clearly-erroneous standard – with its deference to the trier of fact – is the rule, not the exception." Deferential review is particularly appropriate for questions of motivation, intent, pretext and credibility, as has long been recognized in this Court's jurisprudence. *Dean v. Davis*, 242 U.S. 438, 444-45 (1917) (intent "is a question of fact in each case" subject to sufficiency of the evidence review); *Second Russian Ins. Co. v. Miller*, 268 U.S. 552, 557 (1925) (same); *Allen v. Trust Co. of Ga.*, 326 U.S. 630, 636 (1946) ("the dominant, controlling or impelling motive is a question of fact"). As this Court observed more recently in *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998), "improper intent" is "a pure issue of fact." As the Court also stated in *Crawford-El*, "[i]t is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an

element." *Id.* at 600. Similarly, in *Miller v. Fenton*, 474 U.S. 104, 113 (1985), this Court accepted as "well established" the principle that "an inquiry into state of mind" is "a question of fact." Only last year, in reviewing the constitutionality of a child pornography statute, this Court reiterated that intent is a "clear" question of fact. *U.S. v. Williams*, 128 S.Ct. 1830, 1846 (2008).

The question presented in this case is whether the independent review doctrine in First Amendment cases set forth in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), creates a First Amendment exception to the well-established principle of deferential review of findings on intent or motive. The Eleventh Circuit majority in this case erroneously acted as a trial court because it misinterpreted and misapplied this Court's precedent in *Bose* and *Hurley* to hold that all dispositive factual questions in a First Amendment case are "constitutional facts" subject to plenary review. The court of appeals believed that because "the Board's motive is the ultimate fact upon which the resolution of the constitutional question depends," App. at 57a, and because First Amendment issues are extraordinary, *de novo* review of these factual findings is required. *Id.* at 53a.

The purpose of independent review is "to maintain control of, and to clarify, the legal

principles."[5] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *Ornelas v. U.S*, 517 U.S. 690, 697 (1996)). In the First Amendment context, this Court applies the doctrine to require *de novo* review of not only questions of law, but of mixed questions of law and fact for the purpose of determining what falls within, and what falls outside, the protections of the First Amendment, "to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp.*, 466 U.S. at 499. This independent review function may appropriately be understood as the application of law to historical facts, or the relation of a legal standard of conduct to facts established by the evidence for the purpose of determining whether expression is protected by the First Amendment. *See* Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235-36 (1985). As this Court stated in *Bose*, it is the role of the appellate courts to determine what speech falls within, and what speech falls outside, the protections of the First Amendment. *Bose Corp.*,466 U.S. at 501-03 and n. 21.

Thus, in *Hurley*, this Court invoked the independent review doctrine to determine *de novo* whether a parade was in fact an expressive activity as defined by the First Amendment. "[T]hough we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity

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[5] In this Petition, the terms "independent review," "*de novo* review," and "constitutional fact review" are used interchangeably.

place it within the vast realm of nonexpressive conduct, our obligation is to make an independent examination of the whole record so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression." 515 U.S. at 567-68 (citations omitted). In *Bose*, this Court established that actual malice in a defamation case is reviewed *de novo* as a question of law, part of "an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp.*, 466 U.S. at 501.

Similarly, in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), this Court held that defining the parameters of what facts meet the legal standard of actual malice and reckless disregard is for the Court *de novo*. Importantly, however, the Court recognized that it must defer to the fact finder on subsidiary crucial factual findings, including credibility determinations, *id.* at 662, and motive and state of mind, *id.* at 668 and 681, which were relevant to the finding of actual malice. *Id.* Thus, in *Harte-Hanks*, this Court held that under *Bose*, credibility determinations remain the province of the factfinder, *id.* at 688, and that so long as there is sufficient evidence to support a factfinder's credibility determination regarding conflicting testimony on facts central to actual malice (whether that factfinder is a judge or jury), then the holding should be affirmed without *de novo* review of those crucial underlying facts. *Id.* at 688-93. *See also Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987)

(independent review required to determine whether public employee's statement is one of "public concern"), and *Jenkins v. Georgia*, 418 U.S. 153 (1974) (requiring *de novo* review to determine whether material is obscene).

The "constitutional fact" subject to *de novo* review in this Court's First Amendment jurisprudence is whether the First Amendment applies to certain expression or conduct – the application of the law to facts – not what motivated the government actors. Motive, pretext, and viewpoint discrimination found by the district court in this case are particularly ill-suited for *de novo* review because they rest on crucial subsidiary facts such as credibility determinations, resolution of conflicting evidence and weight of the evidence determinations made by the trial judge. They are, at their core, clear fact determinations that can be made "by a person who is ignorant of the applicable law." Monaghan, *supra* at 235. As this Court remarked in *U.S. v. Williams*:

> Whether someone held a belief or had an intent is a true-or-false determination ... . Similarly true or false is the determination whether a particular formulation reflects a belief that material or purported material is child pornography ... . [C]ourts and juries every day pass upon knowledge, belief and intent – the state of men's minds – having before them no more than evidence of their words and

> conduct, from which, in ordinary human experience, mental condition may be inferred.

128 S.Ct. at 1846 (citations omitted).[6]

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[6] Indeed, in other contexts, this Court has expressly declined to apply any review standard other than "clearly erroneous" to the fact finder's determination of malicious motive or discriminatory intent. *Hernandez v. N.Y.*, 500 U.S. 352, 367 (1991) (limiting *Bose* and applying clearly erroneous standard to factual findings on discriminatory intent, "whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law; ... Whether a prosecutor intended to discriminate on the basis of race ... [is] a question of historical fact.") (citation omitted); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (noting that "issues of intent are commonly treated as factual matters" and declaring that "the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large [electoral] system in Burke County is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact.") (citation omitted).

Similarly, in Establishment Clause cases, courts have distinguished between the factual "actual purpose or state of mind" inquiry and the legal "reasonable person" standard utilized in the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As the Tenth Circuit recently remarked in applying *Lemon*, where the question is not the actual purpose or capacity of the government officials but "whether a reasonable observer would have perceived them as being engaged in official activities," then "the answer to that question is closely (if not inextricably) intertwined with the legal effect determination. Therefore, insofar as it is a factual finding at all, the court's assertion regarding the reasonable observer's perception is akin to a finding concerning a constitutional fact and subject to de novo review." *Green v. Haskell County Board of Commissioners*,

(footnote continued ...)

The Eleventh Circuit's decision in this case parts company with established First Amendment jurisprudence because the appellate court's *de novo* review extended well beyond the application of a legal standard to historical facts. The circuit court assumed for the purposes of the appeal that the legal standard enunciated by the *Pico* plurality applied in this case, *i.e.*, "school officials may not remove books from library shelves 'simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" App. at 51a, 57a, quoting *Pico,* 457 U.S. at 872. The panel majority then proceeded not to consider *de novo* any mixed questions of law or fact, but to disregard every historical fact found by the district court and to make a different historical determination about what motivated the School Board. This was not a case, at least as perceived by the Eleventh Circuit, in which "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Hurley*, 515 U.S. at 567-68 (citations omitted). The circuit court accepted the law to be that as defined by the *Pico* plurality. It did not analyze the historical facts found by the district court to determine whether they met the legal standard enunciated in *Pico*. Rather, it dispensed entirely with all the findings of fact made by the district court, created its

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(... footnote continued)
__ F.3d __, 2009 WL 1579495, *13, n. 11 (10th Cir., June 8, 2009) (citation omitted).

own record, and determined its own facts. This is squarely prohibited by Rule 52 and is neither compelled nor permitted by the constitutional fact review doctrine.

This Court's holdings in *Bose* and *Hurley* do not – as the Eleventh Circuit mistakenly surmised – convert all the important factual questions in a First Amendment case to "constitutional facts" which can be decided by the appellate courts in the first instance. Instead *Hurley*, like *Bose*, carefully explained that the role of appellate courts exercising their power of independent review in a First Amendment case is to "decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection," to avoid "forbidden intrusion on the field of free expression." *Hurley*, 515 U.S. at 567-68.

The Eleventh Circuit's *de novo* review of dispositive First Amendment questions of motivation, intent and pretext that turn on credibility determinations and weighing the evidence is at odds with this Court's precedent and the interpretation of *Bose* by at least two other circuits – the District of Columbia Circuit and the Ninth Circuit.

Even though findings about intent may be dispositive, they remain factual determinations that may not be wrested from the trier of fact. As this Court observed in *Miller*, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."

Miller v. Fenton, 474 U.S. at 113-14. Further, in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000), this Court reaffirmed the principle that appellate courts owe deference to factual determinations made by the trier of fact on questions of intent and pretext. This Court held that where a circuit court "disregarded critical evidence favorable to petitioner" and "discredited petitioner's evidence ... by giving weight" instead to other evidence in the record, the appeals court "impermissibly substituted its judgment" for that of the factfinder at trial. *Id.* at 152-53. This is precisely what the Eleventh Circuit did here.

While the circuits have struggled with the "constitutional fact" doctrine in First Amendment cases since the *Bose* decision was announced,[7] none have reached the same conclusion as the Eleventh Circuit in this case. The Circuit's mistake in construing *Bose* to mandate plenary review of *every* important factual determination made by the trial court in a First Amendment case, (to "find the disputed ... motive facts ourselves, as though the district court had never made any findings about

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[7] *See* discussion at part B, below, *and City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, n. 3 (1986); *U.S. v. Friday*, 525 F.3d 938, 949-50 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997); Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 266-67 (1985). *See also, e.g., Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 176 (1983) (recognizing, even before *Bose*, that "the line between 'historical fact' and 'constitutional fact' is often fuzzy at best.") (citation omitted).

them"),[8] is apparent from this Court's decision in *Bose* itself, which deferred to the district court on questions of fact encompassed within Rule 52, including those based on weighing evidence and making credibility determinations. As the Supreme Court explained:

> "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due. Indeed, as we previously observed, the Court of Appeals in this case expressly declined to second-guess the District Judge on the credibility of the witnesses.

466 U.S. at 499-500.

Thus, in *Bose*, this Court expressly endorsed the view "that special deference be given to a trial judge's credibility determinations." *Id.* at 500. Moreover, this Court stated that deference is due to all "findings of fact, including those described as 'ultimate facts' because they may determine the outcome of litigation." *Id.* The Court explained:

> There are, of course, many findings of fact in a defamation case that are irrelevant to the [actual malice

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[8] App. at 62a.

> determination] and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a "de novo" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual-malice determination.

Id. at 514, n. 31.

The Eleventh Circuit's review of the entire record *de novo,* re-weighing all the evidence, and making its own crucial historical fact determinations without any deference to the trial court, turns the purpose of a trial court on its head, and is squarely inapposite to prior holdings of this Court and the plain language of Fed. R. Civ. P. 52(a)(6). As this Court declared in *Anderson v. Bessemer City*, 470 U.S. at 574, when an appellate court re-weighs the evidence in the record it has conducted an improper *de novo* review, particularly when the district court's finding were based on evidence before it or inferences from that evidence. Neither *Bose* nor *Hurley* create a First Amendment exception to these established jurisprudential principles.

Subjecting the question of whether speech or conduct is protected by the First Amendment to a searching inquiry on appeal is not an invitation to the courts of appeal to reconsider factual findings regarding motive and intent that are not clearly erroneous, or to second-guess the trial judge's credibility determinations.

As mentioned above, the Eleventh Circuit's interpretation of *Bose's de novo* review requirement conflicts with the District of Columbia and Ninth Circuits. In *Tavoulareas v. Piro*, 763 F.2d 1472 (D.C. Cir. 1985), the *en banc* District of Columbia Circuit correctly recognized that the *de novo* review for First Amendment questions contemplated by *Bose* "must be limited to the *ultimate constitutional fact*, or else all factual determinations in a First Amendment case would be for the court ... . Appellate courts are

not to examine the evidence of both parties *and then decide which to believe*." *Id.* at 1479-80 (emphasis in original) (citation omitted). In *Tavoulareas*, another actual malice case, the constitutional fact at issue was, as the D.C. Circuit emphasized, "the *application* of the rule (the constitutional function), rather than the finding of subsidiary facts." *Id.* at 1480 (emphasis in original) (citing *Bose*). Similarly, in *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), the Ninth Circuit applied *Bose*'s constitutional test to the findings of fact made by a jury – facts to which the appeals court deferred. The Ninth Circuit properly characterized its task: "we must determine whether the *believed* evidence establishes actual malice." *Id.* at 1252 (emphasis in original).

Here, the task for the Eleventh Circuit should have been, given the believed evidence found by the district court, did that evidence establish a First Amendment violation under the applicable standard?[9] Instead of evaluating the district court's determination of the subsidiary historical facts to ensure that those facts rose to the level of a constitutional violation under *Pico*, the Eleventh Circuit panel ignored those facts entirely and, conducting a *de novo* review of the record, gave credence to facts rejected by the district court and substituted its own judgment as to relevant

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[9] The court agreed to apply the *Pico* plurality standard for the purposes of considering the School Board's appeal: "under the *Pico* plurality standard we are assuming applies, the Board's motive is the ultimate fact upon which the resolution of the constitutional question depends." App. at 57a.

historical facts. Having made its own findings as to motivation, the panel then determined that *those* findings did not rise to the level of a constitutional violation under *Pico*.

The Eleventh Circuit's decision in this case that *Bose* mandates a retrial by the appeals courts of all important facts in a First Amendment case[10] is a substantial departure from the accepted and usual course of judicial proceedings and conflicts with prior holdings of this Court and other circuits. Certiorari is therefore warranted on this important question.

B. THE CIRCUITS ARE DIVIDED ON WHETHER THE "INDEPENDENT REVIEW" STANDARD APPLIES WHEN THE FINDINGS BELOW SUPPORT A HOLDING IN FAVOR OF FIRST AMENDMENT CLAIMS.

The circuits are closely divided on the important question of whether the "clearly erroneous" standard of review applies to all of the factual findings in the trial court (including constitutional facts) when the trial court has ruled in favor of a First Amendment claimant. This Court's decisions in *Bose Corp. v. Consumers Union* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, discussed extensively above, both require *de novo* review of "constitutional facts" when the trial court has denied a claimant relief under the

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[10] *See* pp. 13-15, 24-25, *supra*.

First Amendment. The stated purpose of this review is to ensure that there is no "forbidden intrusion on the field of free expression." *Hurley*, 515 U.S. at 568 (citations omitted). Both cases leave open the question of whether *de novo* review is required when the trial court has found *in favor* of the First Amendment claimant. *U.S. v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) ("the *Bose* opinion does not make clear whether its more searching review ... applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant."), *cert. denied*, 129 S.Ct. 1312 (2009). *See also Don's Porta Signs, Inc. v. Clearwater*, 485 U.S. 981 (1988) (White, J., dissenting from denial of certiorari on this question); Monaghan, *supra* at 245-46.

The circuit courts are divided 4-3 on the question of whether deferential, rather than *de novo*, review is warranted when the trial court has found *in favor* of a First Amendment claimant. The First, Fifth, Tenth and Eleventh Circuits all apply heightened review "to all constitutional holdings defining the perimeters of unprotected categories of speech, regardless of whether the lower court held that speech was protected or unprotected." *U.S. v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring) (*citing Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n. 9 (11th Cir. 1987); *Lindsay v. San Antonio*, 821 F.2d 1103, 1107-08 (5th Cir. 1987)); *see also U.S. v. Friday*, 525 F.3d at 950 (noting circuit split and stating "[a]lthough we have never explained why, this Circuit has applied *Bose* even when First Amendment claims prevailed below ... .").

At least three other circuits, the Fourth, Seventh and Ninth, have all reached a contrary conclusion. Those Circuits review findings of constitutional fact on a government's appeal from a First Amendment decision in favor of the claimant for clear error, rather than *de novo*. These circuits have all reasoned that no special solicitude need be accorded where the government claims that it has been wrongly prevented from restricting speech. *See, e.g.*: *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993) ("The *Bose* requirement of independent review doesn't apply to the Commission's claim that it has been wrongly prevented from restricting speech.") (citations omitted); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) ("When a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts. When the government challenges the district court's holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for clear error.") (citations omitted); *Planned Parenthood Ass'n. Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985) ("The doctrine of independent review has never been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech.").

The reason for this nonsymmetrical standard of review is because *Bose* and its progeny "rested upon special solicitude for claims that First Amendment rights have been unduly *abridged*.

requiring appellate courts to make an independent examination of the whole record "*in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.*" *Multimedia Publishing Co.*, 991 F.2d at 160 (citing *Bose*, 466 U.S. at 499) (emphasis in original; omitting other citations and internal quotation marks). This is because the purpose of *de novo* independent review in First Amendment cases is "to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.*, 466 U.S. at 511. Thus, where the First Amendment claim has prevailed below, the Fourth, Seventh and Ninth Circuits apply "the normal standard of review" to all the district court's factual findings – including "constitutional facts" in support of First Amendment claims, requiring it to "sustain [those findings] absent clear error. Fed.R.Civ.P. 52(a)." *Id.*

This Court has emphasized that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2659 (2007) (Roberts, C.J.). Although symmetry is often a virtue in applying legal standards, symmetry is inappropriate when applying a heightened standard of review designed to protect, not suppress, First Amendment freedoms. As one scholar has concluded, "if de novo review applies because of the First Amendment, the symmetrical scrutiny of pro-speech findings defies the basic point of the

doctrine."[11] When the free speech claimant wins below, as was the case here, plenary review is not justified by the First Amendment because there is no risk that the factfinder has erroneously abridged a constitutional right. To the contrary, plenary appellate review in this situation can only increase, rather than decrease, the risk of erroneously restricting expression protected by the First Amendment.

Furthermore, for the reasons discussed above, engaging in plenary review of factual findings on appeal of rulings in favor of First Amendment claims "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson v. Bessemer City*, 470 U.S. at 575. Such review also unnecessarily and unfairly adds to the already heavy burden of litigation for the parties: "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.* Plenary appellate review of factual findings also casts aside

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[11] Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 Tul. L. Rev. 1229, 1323 (1996); *see also* Edward H. Cooper, *Rationing and Rationalizing the Resources of Appellate Review*, 63 Notre Dame L. Rev. 645, 661 n. 58 (1988) ("If searching review is justified primarily by the desire to protect free expression, it might be argued that less searching review is appropriate if the district court has upheld a claimed first amendment right.").

the important advantages of deferring to such findings by a trial judge, "who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises," *id.* at 580, and who has the greater "expertise" in making factual findings subject to clearly erroneous review. *Id.* at 581.[12]

Since Justice White's dissent from the denial of certiorari over twenty years ago in *Don's Porta Signs, Inc. v. City of Clearwater,* 485 U.S. at 981, legal scholars and courts have called upon this Court to resolve the split in the circuits and clarify the standard of review of constitutional fact findings in favor of First Amendment claims. *See, e.g.*: *U.S. v. Friday,* 525 F.3d at 950; L. Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review for First Amendment Free Speech Cases*, 31 Creighton L. Rev. 387, 401 (1998) ("The one thing that stands out from a review of the decisions from the various circuits is that there clearly exists a lack of uniformity among the circuit courts of appeal as to the appropriate standard of appellate review in First Amendment free speech cases. The formulation of the standard of

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[12] *See also Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. at 176 ("It will do the cause of legal certainty little good if this Court turns every colorable claim that a state court erred in a particular application of [constitutional fact] principles into a *de novo* adjudication, whose unintended nuances would then spawn further litigation and an avalanche of critical comment. Rather, our task must be to determine whether the state court applied the correct standards to the case ... .") (footnote omitted).

review in free speech cases needs clarification from the Supreme Court in order to make appellate review more uniform in all circuits.")

This Court should take this opportunity to resolve the circuit split and to clarify that constitutional fact review is subject to appellate review under the normal Rule 52(a) clearly erroneous standard where a First Amendment claim has prevailed in the district court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RANDALL C. MARSHALL
ACLU FOUNDATION OF
FLORIDA, INC.
4500 Biscayne Blvd.
Suite 340
Miami, FL 33137
(786) 363-2700

JONEL NEWMAN
Counsel of Record
UNIVERSITY OF MIAMI
SCHOOL OF LAW
1311 Miller Drive
Coral Gables, FL 33146
(305) 284-4125

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14633

D.C. Docket No. 06-21577-CV-ASG

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INCORPORATED, MIAMI-DADE COUNTY STUDENT GOVERNMENT ASSOCIATION,

Plaintiffs-Appellees,

Versus

MIAMI-DADE COUNTY SCHOOL BOARD, RUDOLPH F. CREW,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(February 5, 2009)

Before CARNES and WILSON, Circuit Judges, and WALTER,* District Judge.

CARNES, Circuit Judge:

Kafka advised a friend that "we ought to read only books that bite and sting us. If the book we are reading doesn't shake us awake like a blow on the skull, why bother reading it in the first place?"[1] The kind of biting, stinging, and shaking Kafka advocated, however, is not the kind we feel when we read a purportedly nonfiction book filled with factual errors, distortions, and misrepresentations. Juan Amador was outraged when he read the inaccurate portrayal of life in Cuba that was contained in a book on the shelves of the library where his young daughter [R:19:397] went to school. He asked that the book be removed from the shelves, explaining that, "[a]s a former political prisoner from Cuba, I find the material to be untruthful. It portrays a life in Cuba that does not exist." *ACLU of Fla, Inc. v. Miami-Dade County Sch. Bd.*, 439 F. Supp. 2d 1242, 1247 (S.D. Fla. 2006). After a lengthy review process, the School Board removed the book.

Illustrating something akin to Newton's Third Law of Motion, the action the School Board took at Amador's request caused an equal and opposite reaction from another parent and two organizations. They promptly sued the Board.

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* Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

[1] Letter from Franz Kafka to his friend Oskar Pollak (Jan. 27, 1904), *in* Alberto Manguel, A History of Reading 91 (Penguin Books 1997).

Agreeing with their claims that the School Board's action violated the First Amendment and the Due Process Clause, a federal district court enjoined the Board from removing the book. *Id.* at 1294. This is the Board's appeal.

I.

The Miami-Dade County Public School District has forty-nine copies of the book, *A Visit to Cuba*, and its Spanish-language counterpart, *¡Vamos a Cuba!*, spread out among thirty-three of its elementary and middle schools. *Id.* at 1249. (For convenience we will refer to all forty-nine copies by the Spanish language title *Vamos a Cuba*.) The *Vamos a Cuba* book is part of a series of books which "targets readers between the ages of 4 to 8 years old, and [is] written to provide basic information about what life is like for a child" in various countries.[2] *Id.* at 1248. The "A Visit to" series also includes books about Puerto Rico, Costa Rica, Colombia, Brazil, Cambodia, England, Egypt, the United Kingdom,[3]

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[2] The elementary school libraries that contain *Vamos a Cuba* provide books for children from kindergarten through fifth grade. [R:27:10:¶ 11] The publisher of *Vamos a Cuba* describes the target audience as "K–2." [R:19:293] One expert witness also testified that the book is aimed at children in kindergarten through second grade. [R:27:92:¶ 6; T:19:18] Another expert testified that the book was written for children from the ages of five to seven. [R:27:128:¶10] Yet another stated that the relevant age group was children from four to eight. [R:62:113] Mark Balzli, a plaintiff in the case who testified that he wanted to read the book with his son, stated that his son was six years old. [R:19:247:¶ 2]

[3] The United Kingdom, of course, consists of England, Northern Ireland, Scotland, and Wales. In addition to a book on each of those four countries the series includes one on the United

Canada, Vietnam, Wales, Australia, China, Japan, Scotland, Mexico, Italy, Israel, Ireland, India, Greece, Germany, and France. The school district has at least one copy of those other "A Visit to" books in some of its elementary and middle school libraries. *Id.* at 1248–49. [R:28] The "A Visit to" series is located in the libraries' nonfiction (history, geography, cultures) section. [R:19:59]

The books in the "A Visit to" series all follow the same "formulaic format." *Id.* at 1254. They offer the young reader "superficial introductions to geography, people, customs, language, and daily life." *Id.* at 1249 n.8 (quoting a peer review of the series). "The large-print texts are accompanied by color photos of varying quality and relevance." *Id.* For example, the thirty-two pages of *Vamos a Cuba* contain general statements about Cuba's geography ("Cuba is a country in the *Caribbean Sea*, south of Florida."), people ("Most Cubans live in cities."), customs ("Cubans dress to keep cool in the hot weather."), language ("Most people in Cuba speak Spanish."), and daily life ("People in Cuba eat, work, and go to school like you do."). *Id.* at 1247 n.4, 1249 n.8. [R:28 Ex: A Visit to Cuba]

The library at Marjory Stoneman Douglas Elementary School is one of the thirty-three district libraries with *Vamos a Cuba* in its collection. *Id.* at 1248. On April 4, 2006, Juan Amador, the father of a young girl at Douglas Elementary, filed a "Citizen's Request for Reconsideration

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Kingdom as a whole.

of Media" to have *Vamos a Cuba* removed from the library at his daughter's school. *Id.* at 1247. [R:19:Ex.32] On the request form Amador identified himself as a former political prisoner and complained that the material in the book was not truthful and "portrays a life in Cuba that does not exist." *Id.* Amador also wrote that, "I believe [*Vamos a Cuba*] aims to create an illusion and distort reality." [*Id.*] He recommended that the book be replaced by one "that truly reflects the plight of the Cuban people of the past and present." [*Id.*]

The school district has a four-tiered administrative procedure for reviewing citizen requests to remove books from the district's libraries. [R:8:Ex.G:86-90] The initial complaint about a book goes to the school's principal, even though he does not have the authority on his own to remove a book. [*Id.* at 86] Apparently, the only authority the principal has is to explain why the school has the book in its library collection. If the complainant is not satisfied with the explanation, he can file a formal request that the book be removed. [*Id.* at 86-87]

The formal request is heard by a School Materials Review Committee, an ad hoc group composed of teachers, administrators, counselors, library specialists, students, and parents from the school where the complaint was made. [*Id.* at 87] This School Committee reviews the book. It considers the Board's fifteen criteria for selecting library materials: educational significance, appropriateness, accuracy, literary merit, scope,

authority, special features, translation integrity, arrangement, treatment, technical quality, aesthetic quality, potential demand, durability, and lack of obscene material. The School Committee may also solicit any "professional written reviews" of the book and any comments by library experts and "appropriate audiences." [*Id.* at 83, 87-88] After the review the School Committee recommends to the principal whether to retain, remove, or limit the use of the book as part of the library's collection. [*Id.* at 83, 87-88]

If the complaining citizen is dissatisfied with the School Committee's recommendation, he may appeal it to the superintendent, who has the option of issuing a decision based on that committee's recommendation or submitting the appeal to the District Materials Review Committee. The District Committee is an ad hoc group made up of district administrators, principals from other schools, library specialists from other schools, a student, a union official, a member of the parent-teacher association, and a "lay person." [*Id.* at 88-89] If the superintendent submits the appeal to the District Committee, it will review the same materials as the School Committee and will make its own independent recommendation to the superintendent of schools. [*Id.* at 89] The superintendent then considers the District Committee's recommendation and decides whether to remove the book. [*Id.* at 89-90] The superintendent's decision can be appealed to the School Board, which has the final say insofar as the

school system is concerned. [*Id.* at 90]

In this case Amador followed the administrative review process from start to finish. Because he was not satisfied with the principal's explanation about *Vamos a Cuba*, he submitted a formal request to the School Committee to remove the book from the Douglas Elementary library. [R:19:Ex.10:55-57] The School Committee considered the book in light of the district's fifteen written criteria for evaluating books for its school library collections. [*Id.* at 54-55; *see id.* at 64-71] Some of the eight committee members believed that *Vamos a Cuba* was "factually accurate," "apolitical," and "appropriate for the age group," while one member felt that the "author could have better written and researched the topic," and another was convinced that the book did not meet the district's criteria for accuracy. [*Id.* at 64-71] All eight members checked the "meets criteria" box for the categories of "educational significance" and "appropriateness." [*Id.*; see *also* ACLU Br. 10] The School Committee's vote was seven to one in favor of retaining *Vamos a Cuba* in the Douglas Elementary library. [*Id.* at 56]

Amador appealed the School Committee's decision to retain the book in the Douglas Elementary library to the superintendent, who submitted the appeal to the District Committee. [R:19:Ex.8:49] The seventeen-member District Committee decided to evaluate *Vamos a Cuba* based on what it determined to be the three most important of the fifteen criteria: educational

significance, appropriateness, and accuracy. [R:19:Ex.7:44] As to those three factors, one committee member said that the title of the book was inaccurate both because "Cuba is not a country [one is] free to visit," and because the cave drawings pictured on page 29 of the book "were not painted 1,000 years ago as the text states." [*Id.* at 46-47] Another District Committee member said that other books in the "A Visit to" series, and specifically the one on Vietnam, another communist country, "contain[] more specific information and ha[ve] more accuracy whereas, *A Visit to Cuba* detracts [sic] factual information and contains inaccuracies when comparing formulaic sentences." [*Id.* at 46] Still another member commented that the "A Visit to" series consists of "formula books" that "contain the same type of information presented in the same formulaic matter." [*Id.*] The District Committee, by a vote of 15 to 1, recommended that the superintendent retain *Vamos a Cuba* in the Douglas Elementary library. [R:19:Ex.5:8] (One member resigned before the vote, stating that "he had concerns regarding the ability of the committee to render an objective decision.") [R:19:Ex.36:3]

The superintendent adopted the District Committee's recommendation and informed Amador of his decision to leave *Vamos a Cuba* on the library shelves. [R:19:Ex.4:6; R:19:Ex.3:4-5] Amador appealed the superintendent's decision to the School Board the same day and asked that the Board take up his appeal at its next meeting. [R:19:Ex.2:3] It did so. [R:8:Ex.I] In its April 18,

2006 meeting, the Board heard comments from guest speakers in the community and considered the issue of removing *Vamos a Cuba* from the libraries. [R:19:297-390] In its June 14, 2006 meeting, Board members spoke about their views on the subject, and a majority of the Board voted for removal of *Vamos a Cuba*. [R:19:449]

At that June 14 meeting, after Amador spoke, Board chairman Augustin Barrera began the discussion for the Board. He stated that the "issues before us, to me are quite clear, it's issues of inaccuracies, it's issues of omissions, because sometimes the words that are not said are more powerful than those words which are said, and sometimes there's generalities, which [is] how this book is portrayed." [R:19:Ex.34:9] Chairman Barrera continued:

> We talk about censorship, the parent, Mr. Amador, talked about censorship. Censorship is when you want to stop somebody from giving another opinion, something that goes against what you believe in.
>
> In this particular case, when I read the book, it doesn't really give an opinion, what it does is it gives a lack of information, and it's in that lack of information that I think we as the Cuban community are offended. . . .
>
> I cannot support the recommendations that are made here today by the superintendent. What I can support is

> the replacement of this book with a book that really talks about the richness and the culture that the Cuban people have lived and, if it was up to me, I would replace the whole series, because those books do not do justice to those 24 countries, and I think we owe it to the students in Miami-Dade County public schools to give them the best education possible.

[*Id.* at 13, 15]

Board member Ana Rivas Logan spoke next. [*Id.* at 15] She said that "from the very first day" she reviewed *Vamos a Cuba* she had "found the book extremely offensive, inaccurate, full of omissions." [*Id.* at 17] Board member Logan continued: "I reviewed the other books [in the series]. The other books don't paint the same portrait; in other words, they also have omissions." [*Id.*] Noting that the school district replaces outdated library books "every few years" as a matter of course, Logan said:

> At the appropriate time, Mr. Chair, I'd like to make the motion to replace the series with a new and updated series, which is nothing different than what we're going to be doing across this county, and across this state, and probably across this nation in every single school.

[*Id.* at 18]

After Logan spoke, Board member Frank

Bolanos noted that the School Board rules "put[] in place and set[] forth very clear educational standards that must be met by books that are placed in our public school library." [*Id.* at 19] *Vamos a Cuba*, he said, "does not meet those standards, that is crystal clear." [*Id.*] He continued:

> We're talking here about a simple right, I believe it's also a right protected by The U.S. Constitution, and that is the right and the responsibility that we teach our children the truth; that is a sacred right and responsibility.
>
> And if we recognize as, even members of the committee that looked at this book, as the superintendent has recognized when he made an offer to place a label of distinction and separation of the book, if we recognize that this book due to its acts of commission, and omission does not teach our children the truth about Cuba, then it should be removed from our public school libraries, we have that sacred responsibility.

[*Id.* at 19-20]

Board vice-chair Perla Tabares Hantman explained that she did not view the issue to remove the *Vamos a Cuba* book as "one of censorship or about banning a book." [*Id.* at 21, 24] "I view this," she continued, "as one of

accuracy and truth." She explained:

> I don't think anyone here would support the presence of a math book in our libraries that taught that two plus two equals five.
>
> I don't think anyone here would support the presence of a geography book in our libraries that says that Miami is boarded [sic] by the Pacific Ocean.
>
> Similarly, I cannot support the presence of a book in our school that creates a misleading and inaccurate portrait of Cuba. . . .
>
> . . . .
>
> . . . I read the book, and in many pages, I would say at least 14 omissions or statements that are not true, so that's why I said that this is not about censorship or banning. This is about a book that is not accurate, and there's nothing that—I cannot support this book in our libraries.

[*Id.* at 24-25]

Board member Marta Perez thanked "all of the people on both sides of this issue that have come together to express their opinions," but regretted "that this issue so divides our community." [*Id.* at 25-26] She seconded Bolanos' motion to remove the book. [*Id.*]

Board member Evelyn Langlieb Greer explained that the "beauty" of the administrative procedure for requesting that a book be removed from the library was that "it takes the emotion and the politics out" of the decision-making process, "and substitutes professional judgment." [*Id.* at 29, 33-34] She explained:

> Once a book is in a system, and has enjoyed the consent of the administrative, of being in the system, it can only be legitimately removed in this country based on serious, material, irrevocable and clear inaccuracies and biases.
>
> The 22 professional educators who reviewed this book have affirmatively determined that that is not the case, therefore, we are here today in essentially a political process. . . .
>
> We are rejecting the professional recommendation of our staff based on political imperatives that have been pressed upon members of this board, which I completely understand, and with which I sympathize, but one of the things we did when we took an oath of office today is to uphold The Constitution of The United States as it has been set down and interpreted by The United States Supreme Court.

[*Id.* at 34-35]

Board member Martin Karp explained that

"the author's intent in *Vamos a Cuba* was not to say anything about the politics of the country, and the harsh realities that exist there, but sometimes, as our Chair said, when you do not say anything or avoid addressing real problems, you say a lot." [*Id.* at 36-37] He said that the way to handle the problem "is to give our children a more accurate, age appropriate picture." [*Id.* at 37]

Finally Board member Robert Ingram spoke. [*Id.* at 38] He suggested that if some of his colleagues on the School Board did not vote to remove *Vamos a Cuba* from the libraries, "they can't walk out of here. If they don't vote for it, they can't go home, they might find a bomb under their automobiles, and I feel that's a shame to be put upon a school system that we are trying to train our children to have equality and justice." [*Id.* at 40] Board member Ingram continued:

> To say that if I say, no, that I'm pro-communist; to say if I say, yes, I'm anti [i]s to create a context that doesn't fit me. I move for what I believe to be right and what I believe to be accurate. . . .
>
> Will there be some condemnations? I honestly believe there will be. Will my children and my grandchildren be at risk? They just might be, because of the e-mails, and many of the things that have come in my direction have not been pleasant.
>
> And I cannot believe that this

> community, that this Miami-Dade County community, who wants to grow, and be as diverse and, clearly, all it's claimed to be diverse in representing everybody to create a context that promotes threats, that promotes violence. . . .
>
> I can't vote my conscience without feeling threatened. That should never happen in this community anymore. That should never happen anymore, and especially at this place that we call Miami-Dade County Public Schools, especially at this dias [sic], where we're supposedly setting a tone for our children.

[*Id.* at 42-44]

After all Board members who wished to speak (eight of the nine) had done so, Board member Logan made a motion. Her motion was to reject the superintendent's decision to retain the *Vamos a Cuba* book in the Douglas Elementary library and to replace the entire "A Visit to" series in the district's libraries "with updated books that are more actual to real life in these countries." [*Id.* at 57-58] Logan stated that the "findings" for her motion were "that the book is inaccurate, it has omissions." [*Id.* at 59] Board member Bolonas seconded the motion. [*Id.*] The motion was approved by a vote of 6 to 3. [*Id.*] The Board's decision, as contained in its written order, provided:

> Upon a review of the complete Record of

> the proceedings below, including the transcript of the proceedings on Board Agenda Item G-3 (incorporated herein by reference and attached hereto, and made a part of this Final Order), the Superintendent's recommendation sustaining the District Materials Review Committee's decision is hereby rejected. The foregoing is based upon the findings reflected by the record of these proceedings, and more specifically the finding that the book is inaccurate and contains several omissions. It is further ordered that, this book and the series it is a part of, be replaced, throughout the school district, with a more accurate set of books that is more representative of actual life in these countries.

[R:19:Ex.15] That order was issued on June 14, 2006.

About a week later the American Civil Liberties Union of Florida, Inc. and the Miami-Dade County Student Government Association filed a complaint, pursuant to 42 U.S.C. § 1983, in the Southern District of Florida against the School Board and the superintendent seeking declaratory and injunctive relief. [R:1:1-2] The ACLU and the student government association alleged that the defendants had violated their members' First Amendment rights to freedom of speech and access to information as well as their Fourteenth Amendment rights to due process. [*Id.* at 14-16]

The plaintiffs also requested that the district court enjoin the School Board from enforcing its removal order. [R:7]

The plaintiffs argued to the district court that both the ACLU and the student government association had standing. The ACLU's standing was premised on the fact that many of its members, who object to removal of the books, have school children in the district. [R:23:4-5] Howard Simon, the ACLU's executive director, swore in his declaration that its Greater Miami Chapter had "approximately 3,500 members within the Miami-Dade County School District including many parents of children who attend Miami-Dade county elementary and middle schools, and who want their children to have access to the books the School Board ordered removed from the libraries." [R:19:Ex.26:4-5] Mark Balzli, a member of that chapter of the ACLU, swore in his declaration that: (1) his son was a student at North Beach Elementary School; (2) he wanted his son to have access to *Vamos a Cuba* and the other books in the "A Visit to" series; (3) he saw *Vamos a Cuba* in the North Beach Elementary library; and (4) he had planned to check the book out of the library with his son "in the future," but they "will be unable to do so when school resumes on August 14, 2006" because of the School Board's order removing the series. [R:19:Ex.27]

As for the standing of the student government association, Ronald Bilbao, its former president and a member of its executive board [R:8:Ex.M:1], swore in his supplemental declaration

that he had "spoken to several student members of the SGA who have told me they would like to have access to the books *¡Vamos a Cuba!* and *A Visit to Cuba* and other books in the series." [R:19:Ex.25:1-2] Specifically, the plaintiffs proffered the declaration of Mark Balzli, who swore that he "want[ed] [his] son to have access to the books *¡Vamos a Cuba!* and *A Visit to Cuba* and the other books in the series of which they are a part." [R:19:Ex.27:1; R1:23:10 n.8]

The defendants, in response, sought dismissal of the complaint for lack of standing. [R:24:1] They contended that the ACLU, through its member Mark Balzli, did not have organizational standing to bring the lawsuit because any First Amendment right of access to school library books belongs to the student, not the parent. [R:29:2-3] Since Mark Balzli's son was not a member of the ACLU, the defendants argued, there was no member of that organization whose First Amendment rights had allegedly been violated by the School Board's order to remove the books. [*Id.* at 3]

As to the student government association, the defendants contended that because the organization did not exist separate and apart from the School Board—it was created by the Board and is administered and run by Board employees—it could not, in effect, sue itself by suing the Board. [*Id.* at 3-4]

Even if it could do that, the defendants argued, the student government association is made up of, and represents, only high school students. [*Id.* at 5-6] Because the books in the "A

Visit to" series, including *Vamos a Cuba*, had never been shelved anywhere except in elementary and middle school libraries, none of the student government association's members had access to the books before they were removed. Therefore, they could not have been injured by removal of the books. [*Id.* at 6-7]

Shortly after the defendants filed their motion to dismiss, the plaintiffs amended their complaint to add Mark Balzli, individually and on behalf of his son Aidan, as a plaintiff to the lawsuit. [R:39:1, 3] It was on the basis of that amended complaint that the district court decided the standing issue. *ACLU*, 439 F. Supp. 2d at 1260.

The district court found it unnecessary to decide whether the student government association had standing because it concluded that Balzli and the ACLU did. *Id.* at 1260, 1264. Crediting Balzli's affidavit, the court found that he "had planned to check out the book and read it with his son before the School Board entered its Final Order." *Id.* at 1261. Not only did Balzli want his son to have access to the book, the court found, but before the Board's action the book had also been available to both parents and students through the school district's "inter-library loan system of exchanging books between schools." *Id.* Based on these facts, the district court concluded that Balzli had standing to litigate his First Amendment and due process claims against the defendants. *Id.* at 1262.

As to the ACLU's standing, the district court rejected the defendants' argument that Aidan Balzli

was the true party in interest, and because Aidan was not a member of the ACLU the organization itself did not have standing. *Id.* at 1264. The court reasoned that this "novel" argument would lead to "an illogical result" because "[a]s Defendants acknowledge, under Florida law, Aidan Balzli may only bring suit through a next friend, in this case, his father. Therefore, his father has standing to pursue relief on his behalf." *Id.* And because Mark Balzli is a member of the ACLU, the district court reasoned, the organization has standing to litigate the suit on his behalf. *Id.* at 1263-64.

After concluding that Balzli and the ACLU had standing, the court found that: (1) the plaintiffs were likely to succeed on their First and Fourteenth Amendment claims, *id.* at 1283, 1292; (2) they would be irreparably harmed if the School Board's removal order were allowed to stand pending a trial on their complaint, *id.* at 1292-93; (3) this irreparable harm to the plaintiffs outweighed the harm to the defendants in keeping the "A Visit to" series books on the library shelves, *id.* at 1293; and (4) it was in the public interest to protect the plaintiffs' constitutional rights to have access to the books, *id.* at 1294. Considering these four factors, which it determined all favored the plaintiffs, the court issued a preliminary injunction enjoining the School Board from enforcing its removal order, and it also ordered that any of the books in the "A Visit to" series that were already removed be returned to the libraries. *Id.*

The defendants filed a notice of appeal from the district court's preliminary injunction order. The books in the "A Visit to" series remain in the school district's libraries. [R:48]

II.

The School Board challenges here, as it did before the district court, the plaintiffs' standing to bring their lawsuit. [Board Br. 30-33] The Board contends that the plaintiffs have failed to establish the requisite imminent injury in fact. [*Id.*] Because standing is a necessary component of our jurisdiction to hear "cases" and "controversies" under Article III of the Constitution, we must address it first. *See Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1169 (11th Cir. 2006). We review the matter anew, without deference to the district court's legal conclusions. *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006).

A.

"The constitutionally minimum requirements for standing are three-fold." *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008) [hereinafter *Fla. NAACP*].

> First, the plaintiff must have suffered, or must face an imminent and not merely hypothetical prospect of suffering, an invasion of a legally protected interest resulting in a "concrete and particularized" injury. Second, the injury must have been

> caused by the defendant's complained-of actions. Third, the plaintiff's injury or threat of injury must likely be redressible by a favorable court decision.

Id. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992)). The battle over standing in this case centers on the first requirement, and specifically on whether the injury the plaintiffs suffered was imminent. [Board Br. 30-33]

In *Lujan* the plaintiff environmental organizations challenged the joint regulation of the Fish and Wildlife Service and the National Marine Fisheries Service, which required that federal agencies consult with the Secretary of the Interior about threats to endangered species or their habitats caused by agency action only if that action was "taken in the United States or on the high seas." *Lujan*, 504 U.S. at 558-59, 112 S. Ct. at 2135. The environmental organizations sought a declaratory judgment that the joint regulation was contrary to the language of the Endangered Species Act. They also sought an injunction forcing the Services to expand their joint regulation to require consultation with the Secretary of the Interior about threats to endangered species and their habitats even when the agency action is to occur outside the United States. *See id.* The Secretary of the Interior moved to dismiss the environmental organizations' lawsuit for lack of standing. *Id.* at 559, 112 S. Ct. at 2135. The district court did so, but the court of appeals

reversed. *Id.*

In discussing the injury in fact requirement, the Supreme Court stated that the environmental organization plaintiffs needed to submit evidence or affidavits establishing that at least one of their members wanted to use or enjoy an endangered animal species in a way that would be directly affected by the Services' regulation. *Id.* at 562-63, 112 S. Ct. at 2137-38. The environmental organizations had submitted the affidavits of two of their members, Joyce Kelly and Amy Skilbred, to establish that the Services' regulation would cause them to suffer the requisite injury. *Id.* at 563, 112 S. Ct. at 2138.

Ms. Kelly swore in her affidavit, which was filed in 1988, that she had "traveled to Egypt in 1986 and 'observed the traditional habitat of the endangered [N]ile crocodile there and intends to do so again, and hopes to observe the crocodile directly.'" *Id.* (quoting Ms. Kelly's affidavit) (alterations omitted). She also swore she intended to return and at that time would "'suffer harm in fact as the result of the American role in overseeing the rehabilitation of the Aswan High Dam on the Nile and in developing Egypt's Master Water Plan.'" *Id.* (quoting Ms. Kelly's affidavit) (alterations and omission omitted).

In Ms. Skilbred's affidavit, which was filed in 1988, she swore that "she traveled to Sri Lanka in 1981 and 'observed the habitat' of 'endangered species such as the Asian elephant and the leopard'

at what is now the site of the Mahaweli project funded by the Agency for International Development." *Id.* (quoting Ms. Skilbred's affidavit) (alteration omitted). That project, she predicted, "'will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited, which may severely shorten the future of these species.'" *Id.* (quoting Ms. Skilbred's affidavit) (alteration and omission omitted). Her desire to use and enjoy these endangered species will be harmed, Ms. Skilbred said, "because she 'intends to return to Sri Lanka in the future and hopes to be more fortunate in spotting at least the endangered elephant and leopard.'" *Id.* (quoting Ms. Skilbred's affidavit) (alternations omitted). When asked at her deposition "when she had any plans to return to Sri Lanka," Ms. Skilbred answered that "'I intend to go back to Sri Lanka,'" but "'I don't know when. There is a civil war going on right now. I don't know. Not next year, I will say. In the future.'" *Id.* at 563-64, 112 S. Ct. at 2138 (quoting Ms. Skilbred's deposition) (alteration omitted).

Those two affidavits, the Supreme Court found, "plainly contain no facts . . . showing how damage to the species will produce 'imminent' injury to Mses. Kelly and Skilbred." *Id.* at 564, 112 S. Ct. at 2138. The Court explained:

> [T]he affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe

> animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

Id. (second alteration in original). And:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.

Id. at 564 n.2, 112 S. Ct. at 2138 n.2 (citation omitted).

In the decade and a half since *Lujan* we have applied and expounded on the Supreme Court's "some day intentions" language three times. The

first time was in *National Parks Conservation Ass'n v. Norton*, 324 F.3d 1229 (11th Cir. 2003), where two environmental organizations had sued the National Park Service for violating the equal protection rights of their members by failing to evict the occupants of the Stiltsville properties (buildings on stilts in the middle of Biscayne Bay, Florida) following the expiration of the lease agreement between the occupants and the Service. That failure, the organizations claimed, was "tantamount to the grant of an exclusive lease to the occupants." *Id.* at 1234.

The district court dismissed for lack of standing the organizations' equal protection claim. *Id.* at 1241. We reversed, citing the affidavits of the groups' members who swore that they "had visited Biscayne National Park (and specifically the area that includes Stiltsville) with frequencies ranging from once per month to fifty times per year," and "indicated an intent to maintain the frequency of these visits in the future." *Id.* at 1242. The members also averred that: (1) their "lack of access to Stiltsville or its surrounding environs impairs [their] recreational and aesthetic enjoyment of the park;" and (2) the impairment "they suffer as a result of the [Service]'s failure to discontinue the exclusive private use of the structures is continually present when they are at or near Stiltsville." *Id.* at 1242-43.

Those facts, we concluded, were sufficient to avoid the "some day intentions" problem of *Lujan*. *Id.* at 1243. We explained that the case before us was not one "in which the

affiants have asserted only 'some day intentions' to return to the site of their harm 'without any description of concrete plans, or indeed even any specification of *when* the some day will be.'" *Id.* (quoting *Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138). Instead, "[t]he affiants state with particularity that they have definite plans to continue visiting Stiltsville with precisely the same frequency that they have to date, and that in the absence of remedial action they will continue to experience the aesthetic and recreational harms described." *Id.*

On the other hand, in *Elend v. Bashman*, 471 F.3d 1199 (11th Cir. 2006), we found the plaintiffs' future intentions insufficiently clear to establish standing. *Id.* at 1208. On November 2, 2002 the three plaintiffs in that case had been protesting outside the Sun Dome in Tampa, Florida during a speech by President Bush when they were ordered by the Secret Service to move to an authorized "protest zone," which was further away. *Id.* at 1202-03. They sued for declaratory and injunctive relief to enjoin the Secret Service from taking similar action in the future, which they claimed would violate their First Amendment rights. *Id.* at 1203. The protestors contended that they had standing because they "'fully intend to peacefully express their viewpoints in the future in a manner similar to their activities on November 2, 2002 in concert with presidential appearances at the USF Sun Dome and at other locations around the country.'" *Id.* at 1204.

The district court dismissed the claims on the

ground that the plaintiffs' assertion that they would protest in a similar manner in the future was too speculative. *Id.* at 1204. We affirmed, noting that "the injury alleged in this case remains wholly inchoate." *Id.* at 1209. We explained:

> Plaintiffs' intention in this case to protest "in concert with presidential appearances at the USF Sun Dome and at other locations around the country" fails to provide any limitation on the universe of possibilities of when or where or how such a protest might occur. . . .
>
> [I]t is entirely conjectural that President Bush would return to speak at a political rally at the Sun Dome. In fact, we have no indication that he has done so again since November 2002 despite numerous presidential visits to Florida. Nor is it even remotely permissible to presume future injury from Plaintiffs' intention to protest "at other locations around the country." To find that this somehow constitutes "real and immediate" injury sufficient to confer standing would eviscerate the meaning of both words.
>
> Indeed, the Plaintiffs' avowed intention to protest in a similar manner in the future is akin to the plaintiff in *Lujan* who declared, "I intend to go back to Sri Lanka [to observe

> endangered species]," but confessed that she had no current plans: "I don't know [when]." *Lujan*, 504 U.S. at 564, 112 S. Ct. 2130. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* In the four years since Plaintiffs' alleged First Amendment violation, they have not asserted that they protested President Bush at the Sun Dome or any other venue, for that matter. The entirely speculative nature of the "future protests" would render wholly advisory any prospective relief.

Id. (third paragraph alterations in original).

Finally, in the recent *Fla. NAACP* case, the state of Florida required that all voter registration applications include the applicant's name, address, date of birth, and driver's license number or the last four digits of her social security number. *Fla. NAACP*, 522 F.3d at 1156. If the applicant inadvertently gave information on the application that did not match the information in the state's driver's license or social security databases, the state would not register her until the error was fixed. *Id.* at 1156-57. The problem was that the applicant often was not notified of the error in time to fix it before the voter

rolls were closed in advance of an upcoming election. *Id.*

The plaintiff voting rights organizations sued the state in September 2007 alleging that the matching requirement, and its interference with the registration of some applicants, violated a number of their members' constitutional and statutory rights to vote. *Id.* at 1158. The state moved to dismiss asserting that the organizations lacked standing in part because they had not alleged an imminent injury. *Id.* The district court disagreed, *id.*, and so did we, *id.* at 1164. We noted that "[a]n imminent injury is one that is 'likely to occur immediately.'" *Id.* at 1161 (citation omitted). The injury the plaintiffs had alleged was "the denial of voter registration and hence the right to have one's vote counted," which would occur "before the scheduled elections in November 2008." *Id.* The organizations also alleged that "they intend to increase voter registration efforts and anticipate increased registration applications ahead of the upcoming presidential election." *Id.* Without a change in Florida's voter registration law, they argued, the new registrants would be unconstitutionally denied the right to vote in the November 2008 election. *Id.* That was enough, we concluded, to satisfy the immediacy requirement. *Id.*

The key in all three of our decisions applying *Lujan* is that "[i]mmediacy requires only that the anticipated injury occur with[in] some fixed period of time in the future." *Id.* Immediacy, in this context, means reasonably fixed and specific in

time and not too far off. In *National Parks*, the injury alleged by the environmental groups—destruction of the Stiltsville area in Biscayne Bay—was imminent because, according to their members, they visited Stiltsville from least once a month to once a week and planned to continue these trips. *National Parks*, 324 F.3d at 1242-43. In *Fla. NAACP* the voting rights organizations alleged that their members would be injured—denied the right to register to vote and have their votes counted—in the November 2008 presidential election. *Fla. NAACP*, 522 F.3d at 1161. In both cases, the imminence requirement was met because the respective plaintiffs alleged that they would be injured within a "fixed period of time in the future."

In *Elend*, on the other hand, "the plaintiffs failed to allege when, where, and how [their] protests were going to occur in the future." *Id.* Instead, all that the *Elend* plaintiffs alleged was that they intended to protest again at some indefinite time and place in the future. *Elend*, 471 F.3d at 1206. As we said, "the Plaintiffs' avowed intention to protest in a similar manner in the future is akin to the plaintiff in *Lujan* who declared, 'I intend to go back to Sri Lanka [to observe endangered species],' but confessed that she had no current plans: 'I don't know [when].'" *Id.* at 1209 (quoting *Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138) (alterations in original). We explained that "[s]uch 'some day' intention—without any description of concrete plans, or indeed even any specification of when the

some day will be—do not support a finding of the 'actual or imminent' injury our cases require." *Id.* (quoting Lujan, 504 U.S. at 564, 112 S. Ct. at 2138).

B.

The plaintiffs in this case have alleged that they will be injured by the removal of *Vamos a Cuba* and the other "A Visit to" books from the school district's libraries. [R:39:13-15] Individual plaintiff Balzli, a member of the ACLU, swore in his declaration that he:

> want[ed] [his] son to have access to the books ¡*Vamos a Cuba*! and *A Visit to Cuba* and the other books in the series of which they are a part. In fact, before the School Board's Order in this case ¡*Vamos a Cuba*! was part of the library collection at North Beach Elementary School and I had seen it with my son and we had planned to check it out and read it together in the future. Unless the Court grants Plaintiffs' request for preliminary injunctive relief we will not be able to do so when the school resumes on August 14, 2006.

[R:19:Ex.27:1-2] The School Board contends that Balzli's declaration is insufficient to establish an injury in fact regarding *Vamos a Cuba* because the asserted injury is not imminent. Balzli's professed future plans are, the Board argues, no more than the kind of someday intention that *Lujan* holds is insufficient. [Board Br. 32] We disagree.

We stated in *Fla. NAACP* that "[i]mmediacy requires only that the anticipated injury occur with[in] some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Fla. NAACP*, 522 F.3d at 1161. Balzli's declaration, which is dated July 5, 2006, states that he anticipated checking out *Vamos a Cuba* "when school resumes on August 14, 2006"—a specific intention pegged to a sufficiently fixed period of time. [R:19:Ex.27] In its immediacy the injury claimed is like that asserted by the voting rights plaintiffs in *Fla. NAACP*. The injury there, unless redressed, would have prevented voters from registering and voting in an election that was to be held on a specific date fourteen months after the complaint in that case was filed. *Id.* The injury here, unless redressed, would have prevented Balzli and his son from checking out *Vamos a Cuba* after school resumed in six weeks. *Lujan* and our decisions interpreting it require no more immediacy than that.

The School Board contends that, even if the injury alleged is sufficiently imminent, Balzli still lacks standing to challenge the School Board's order because the right to check out *Vamos a Cuba* from the district's libraries belongs not to him but to his son. [Board Br. 30-31] We agree with the district court's analysis rejecting this contention. *ACLU*, 439 F. Supp. 2d at 1261-62. Florida law, which applies to capacity determinations in this case, *see* Fed. R. Civ. P. 17(b)(1), requires that "a

child sue by his next friend" because the child does not have capacity to sue on his own, *Kingsley v. Kingsley*, 623 So. 2d 780, 784 (Fla. 5th DCA 1993). The only way for Aidan Balzli to seek redress for his injuries is for his father to sue on his behalf, which is what his father did.

In addition to misfiring on the law, this real party in interest argument of the Board also misses on the facts. The School Board's rules provide parents with the "right to visit the library," and to "review books that are kept there, accompany [their children] through the check-out process, and transfer books between libraries." *ACLU*, 439 F. Supp. 2d at 1262. Balzli, in other words, had the right as a parent to access *Vamos a Cuba* with and for his son. The Board's decision to remove the book from the school district's libraries injured Balzli by taking away that right.

The School Board also contends that it presented "unrebutted" evidence that *Vamos a Cuba* was not in the library collection at the school Aidan attended, and therefore Balzli could not have checked out the book for his son. [Board Br. 31-32] But the evidence was not "unrebutted." Balzli himself disputed the School Board's account when he swore in his declaration and testified at the July 21, 2006 preliminary injunction hearing that he saw *Vamos a Cuba* in the library at the North Beach Elementary School, which his son attended. [R:19:Ex.27:1; R3:62:12] The district court recognized that "[t]here was an issue of fact at the preliminary injunction hearing as to whether Mr. Balzli and his son had seen *Vamos a*

Cuba at the North Beach Elementary School library." *Id.* at 1247 n.2. And the court resolved it in Balzli's favor. *Id.* We review the factfindings underlying a standing determination only for clear error. *See Wooden v. Board of Regents*, 247 F.3d 1262, 1271 n.9 (11th Cir. 2001). We cannot say that the district court's resolution of the conflicting factual assertions was clear error.

For these reasons, we conclude that Balzli has sufficiently asserted that he and his son will suffer an imminent injury from the removal of *Vamos a Cuba* from the school district libraries. None of the other requirements of standing are disputed. It follows that the district court was correct in concluding that Balzli has standing to pursue his First Amendment and due process claims against the School Board for removing *Vamos a Cuba* from the district's libraries. Because Balzli has standing to raise those claims, we need not decide whether either of the organizational plaintiffs also have standing to do so. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 212 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003) ("Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff, the one who has not altered his behavior as a result of the monument, has standing."). We will, however, refer to the "plaintiffs" in the plural to remind ourselves that we have not ruled out the standing of the other groups and

individuals who want to challenge the removal of the *Vamos a Cuba* book.

C.

The standing of any of the plaintiffs to challenge the Board's removal of the other books in the "A Visit to" series is more problematic. The plaintiffs point to three declarations. One is Balzli's, which we have already discussed in connection with the *Vamos a Cuba* book. About the other books in the series, Balzli's declaration merely stated that he "want[ed] [his] son to have access to . . . the other books in the series." He did not state, as he did about the *Vamos a Cuba* book, that he and his son planned to check out any of the other books when school resumed. [R:19:Ex.27]

The other two declarations are similar. In his declaration Ronald Bilbao states that: "I have spoken to several student members of the SGA who have told me they would like to have access to the books ¡*Vamos a Cuba*! and *A Visit to Cuba* and other books in the series." [R:19:Ex.25:1-2] Likewise, Howard Simon, the executive director of the ACLU stated in his declaration that the "Greater Miami Chapter of the ACLU has approximately 3,500 members within the Miami-Dade County School District including many parents of children who attend Miami-Dade County elementary and middle schools, and who want their children to have access to the books the School Board ordered removed from the libraries." [R:19:Ex.26:4-5]

Those three declarations merely establish a free-floating desire to access the other books in

the "A Visit to" series, a desire untethered to any intended action during any reasonably specific period of time. In that respect these declarations are more like the ones in the *Lujan* and *Elend* cases, where imminence was found to be lacking, than they are like the ones in *National Parks* and *Fla. NAACP*, where it was found to be present. In *Lujan* the plaintiffs who submitted affidavits wanted wildlife in Egypt and Sri Lanka preserved so that they could view it. *Lujan*, 504 U.S. at 563-64, 112 S. Ct. at 2138. They had no concrete and definite plans to visit those countries, only a desire to keep the wildlife there alive so that they could go see it someday. *Id.* The Supreme Court held that absent "any description of concrete plans, or indeed even any specification of *when* the some day will be," the statements in the affidavits "d[id] not support a finding of the 'actual or imminent' injury' required for standing." *Id.* at 564, 112 S. Ct. at 2138.

Just as the *Lujan* plaintiffs' general desire to have wildlife preserved for their viewing someday was insufficient to establish an imminent injury in fact, the general desire of the plaintiffs in this case to have the other books in the "A Visit to" series kept in the school library for their use someday is insufficient as well. In both cases it is not enough to have an injury in fact. The injury must be imminent, and in both cases it was not. *See Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138.

The *Elend* decision illustrates the same point. There the plaintiffs, claiming a violation of

their First Amendment right to protest, averred only that "'they fully intend[ed] to peacefully express their viewpoint in the future.'" *Elend*, 471 F.3d at 1206. As we have since explained, the plaintiffs in *Elend* "failed to allege when, where, and how such protests were going to occur in the future." *Fla. NAACP*, 522 F.3d at 1161. The protestors' "intention . . . to protest [in the future] . . . fails to provide any limitation on the universe of possibilities of when or where or how such protest might occur." *Elend*, 471 F.3d at 1209.

Likewise in this case, the plaintiffs have not stated with sufficient specificity their plans for accessing the books in the "A Visit to" series. They have not given any indication of some fixed period of time in the reasonably foreseeable future during which they want to use the books.

The plaintiffs seek to distinguish *Lujan* on the grounds that it would have been much more difficult for the plaintiffs in that case to travel halfway around the world to see wildlife than it would be for a plaintiff in this case to visit a school library and check out a book. Apparently they would distinguish *Elend* on similar grounds, arguing perhaps that it is more difficult to schedule a specific protest of a presidential speech than to go get a book. Their theory is that the easier it is to take the action that will be prevented by the defendant's conduct, the easier it should be to satisfy the imminent injury requirement for standing. We don't think so.

The imminence requirement does not depend on the burden of taking some action that

will be prevented by the alleged injury—going to Egypt or Sri Lanka in *Lujan* or going to the school library in this case. Instead, it depends on the imminence of the action, regardless of how much effort that action involves. A trip to Egypt that is planned for the next week would be more imminent than a trip to a school library when it reopens in a few months. There is no good reason that the specificity of the statement that is acceptable should vary inversely with the difficulty of engaging in the activity that is threatened by the alleged injury. Intricate drafting is not required to describe a threatened injury. Plain English and clear language work best. There is either an imminent injury or there is not. If there is not, there is no standing. If there is an imminent injury, then there may be standing. All the plaintiff has to do is describe the threatened injury and specify why it is imminent. The penalty for failing to do so is dismissal for lack of standing.

It does not matter, as the plaintiffs argue it should, that it is easier to imagine a parent stopping by the school library when dropping off his child than it is to imagine people flying halfway around the world to see wildlife. The allegation of standing requires specification, not imagination. As we explained a few years ago:

> Even though the [plaintiff's] complaint sets forth facts from which we could imagine an injury sufficient to satisfy Article III's standing requirements, we should not speculate concerning the existence of standing,

> nor should we imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none. The plaintiff has the burden to "clearly and specifically set forth facts sufficient to satisfy [] Art. III standing requirements." If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury.

Miccosukee Tribe of Indians v. Fla. State Athletic Comm'n, 226 F.3d 1226, 1229-30 (11th Cir. 2000) (internal citations omitted, second alteration in original).

Without embellishment, which we are powerless to provide, the plaintiffs' declarations do not carry their burden of showing that they faced a threat of imminent injury from the removal of any of the "A Visit to" books from the schooldistrict's libraries except for *Vamos a Cuba*. To the extent that the district court's preliminary injunction enjoins the School Board from enforcing that part of the Board's removal order, we will vacate the injunction and remand for the district court to dismiss for lack of standing the portions of the plaintiffs' complaint that concern any of the "A Visit to" series books other than *Vamos a Cuba*.

III.

Because there is no standing problem with regard to the attack on the School Board's order to remove copies of the *Vamos a Cuba* book

itself from the libraries, we turn to other questions about that part of the preliminary injunction. "A district court may grant [preliminary] injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc); *accord Alabama v. U. S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225-1226 (11th Cir. 2005) (per curiam); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004).

"A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989) (quotation marks omitted). Failure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of success on the merits. *See, e.g., Schiavo*, 403 F.3d at 1226 n.2, 1237; *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994); *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). That is what the School Board says has occurred here. It argues that we should reverse the preliminary

injunction, because the plaintiffs failed to establish a substantial likelihood of success on their claims.

We generally review preliminary injunctions only for an abuse of discretion, but we review *de novo* the legal conclusions on which they are based. *Fla. NAACP*, 522 F.3d at 1166; *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999); *Tefel v. Reno*, 180 F.3d 1286, 1295 (11th Cir. 1999). An abuse of discretion occurs if the district court bases its decision on an erroneous factual premise. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001); *Drill South, Inc. v. Int'l Fid. Ins. Co.*, 234 F.3d 1232, 1239 (11th Cir. 2000); *Jones v. Int'l Riding Helmets, Ltd.*, 49 F.3d 692, 694 (11th Cir. 1995); *see also United States v. Varner*, 13 F.3d 1503, 1508 (11th Cir. 1994) ("Abuse of discretion occurs when the court . . . bases its decisions upon considerations having little factual support.") (quotation marks omitted); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 374 (11th Cir. 1992) (same). Ordinarily, factfindings that matter to the issuance of a preliminary injunction are reviewed only for clear error, *Unique Fin. Concepts*, 196 F.3d at 1198, but that changes in First Amendment free speech cases like this one. For reasons we will explain later, we review *de novo* the core constitutional fact relating to the Board's motive. That means if we disagree with the district court's finding about the Board's motive, its decision to enter a preliminary injunction was an abuse of discretion. It was an abuse of discretion because if we find that the Board was motivated by the

factual errors in the book, the plaintiffs have no chance of success on the merits, much less a substantial one. Insofar as the First Amendment issue is concerned the disagreement in this case is not about the standard of review applicable to preliminary injunctions but about the Board's motive in removing the book from the school library shelves.

IV.

The district court based the preliminary injunction it entered on both the plaintiffs' First Amendment claim and their due process claim. Because they are separate claims we will examine the likelihood of success on the merits as to each in turn.

A.

The parties disagree about the contours of the legal standard we should apply to decide whether it is likely that the plaintiffs will succeed on their claim that the School Board's decision to remove the *Vamos a Cuba* book from all the school district's libraries violated their First Amendment rights. The plaintiffs contend [ACLU Br. 35-40], and the district court agreed, *ACLU*, 439 F. Supp. 2d at 1272-73, that we should apply the test enunciated by a plurality of the Supreme Court in *Board of Education v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982). In *Pico*, a New York school board voted to remove nine books from the libraries of the school district's middle and high schools because the books, according to the school board, were "anti-American, anti-Christian, anti-

Semitic, and just plain filthy," and as a result posed a "moral danger" to the students. *Id.* at 857, 102 S. Ct. at 2803 (alteration removed). Some students at those schools sued the school board claiming that the removal of the books for "social, political, and moral" reasons violated their First Amendment rights to have access to the books. *Id.* at 856, 858-59, 102 S. Ct. at 2802, 2804.

After the district court granted summary judgment for the school board, the Second Circuit reversed and remanded for a trial on the students' First Amendment claim. *Id.* at 859-60, 102 S. Ct. at 2804-05. The Supreme Court affirmed in a badly fractured decision. The lead opinion by Justice Brennan was joined in full only by Justices Marshall and Stevens. *Id.* at 855, 102 S. Ct. at 2802. Justice Blackmun joined parts of that opinion, *id.* at 882, 102 S. Ct. at 2816 (Blackmun, J., concurring in part and concurring in the judgment), including its statement of this constitutional standard: "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* at 872, 102 S. Ct. at 2810 (plurality opinion) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640, 63 S. Ct. 1178, 1187 (19143)); *see also id.* at 879-80, 102 S. Ct. at 2814 (Blackmun, J., concurring in part and concurring in the judgment) ("[S]chool officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in

them, when that action is motivated simply by the officials' disapproval of the ideas involved.").

All four of the justices in the *Pico* plurality gave examples of reasons for which a school board could constitutionally remove books. Justice Brennan's opinion acknowledged the students' concession that it would be "perfectly permissible" to remove a book based on its lack of "educational suitability." *Id.* at 871, 102 S. Ct. at 2810 (plurality opinion). Justice Blackmun, in his separate opinion, acknowledged that: "First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.'" *Id.* at 880, 893, 102 S. Ct. at 2815 (Blackmun, J., concurring in part and concurring in the judgment) (citations omitted).

The other five members of the Court did not join in the views of Justices Brennan or Blackmun. There were four dissenters, who were of the opinion that the First Amendment placed no limits on a school board's power to remove books from school libraries. *Id.* at 885, 893, 102 S. Ct. at 2817, 2821 (Burger, C.J., dissenting, joined by Powell, Rehnquist, and O'Connor, JJ.); *see also id.* at 921, 102 S. Ct. 2835 (O'Connor, J., dissenting) ("If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from

the school library so long as it does not also interfere with the right of students to read the material and to discuss it."). A fifth justice "expresse[d] no opinion on the First Amendment issues, being of the opinion that the Court should not, until after remand, 'issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library.'" *See Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1045 n.30 (Former 5th Cir. 1982) (en banc) (plurality opinion of Hill, J.) (quoting *Pico*, 457 U.S. at 883, 102 S. Ct. at 2816 (White, J., concurring in the judgment)).

The result is that "*Pico* is of no precedential value as to the application of the First Amendment to these issues." *Id.; see also id.* at 1051 n.18 (concurring opinion of Rubin, J., joined by Politz, Randall, and Williams, JJ.) ("Seven Justices filed opinions in *Pico*. The Court divided four-four on the constitutional issue of the extent to which the first amendment limits the discretion of a school board to remove books from a school library. Justice White concurred in the judgment of the Court but did not reach this issue."); *see also Chiras v. Miller*, 432 F.3d 606, 619 n. 32 (5th Cir. 2005) ("[T]his court concluded in *Muir* that *Pico* has no precedential value as to the application of First Amendment principles to the school's decision to remove the books from the library.").[2][sic] With five

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[2][sic] Ironically, there was no majority opinion of the en banc court in the *Muir* case itself, where our best exposition of the *Pico* opinions can be found. However, considering Judge Hill's

different opinions, and no part of any of them gathering five votes from among the nine justices—only one of whom is still on the Court—*Pico* is a non-decision so far as precedent is concerned. It establishes no standard.

The School Board contends that it did not violate the First Amendment regardless of whether we apply *Pico* or the test from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988). [Board Br. 41-45] *Hazelwood* involved a school board decision about the content of the student newspaper as part of the school's curriculum. *See id.* at 262, 108 S. Ct. at 565. The Board argues that the *Vamos a Cuba* book, like all books in the district's libraries, should be considered as part of the curriculum for elementary school students, and when viewed in that light its removal was a curricular decision entitled to deference under the *Hazelwood* decision. [Board Br. at 44-45]

In *Hazelwood* the principal at a Missouri high school directed that the student newspaper, which was written and edited as part of a journalism class, withhold from publication the pages of an issue containing one story about pregnant students and another about the impact of divorce on students. *Id.* at 263-64, 108 S. Ct. at 565-66. The principal was concerned that the story about the pregnant students might

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ten-judge plurality opinion together with Judge Rubin's four-judge concurring opinion, a total of fourteen of the twenty-two judges who participated in the *Muir* decision explicitly recognized that the *Pico* decision has no precedential value.

indirectly reveal their identities, and he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. *Id.* at 263, 108 S. Ct. at 566. He decided to stop publication of the divorce article because in the draft of the article that he reviewed, a student identified by name was quoted complaining about her father's behavior, and her parents had not been given an opportunity to respond. *Id.*

Some of the staff members of the student newspaper sued the school board in *Hazelwood* claiming that preventing publication of the two articles had violated their First Amendment rights. *Id.* at 262, 108 S. Ct. at 565. The district court concluded that no First Amendment violation had occurred. *Id.* at 264, 108 S. Ct. at 566. The court of appeals reversed, reasoning that the school newspaper was a public forum and as a result the school could censor its content only when "'necessary to avoid material and substantial interference with school work or discipline or the rights of others.'" *Id.* at 265, 108 S. Ct. at 567 (citation and alteration omitted). The Supreme Court, in turn, reversed the court of appeals. *Id.* at 266, 108 S. Ct. at 567.

In doing so the Court distinguished its decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733 (1969), concluding that suppression of individual student expression on school premises differs from control of expressive activities that "may fairly be characterized as part of the school curriculum." *Hazelwood*, 484 U.S. at 270-71, 108 S. Ct. at 569-70. The Court rejected the argument

that the school newspaper was a public forum, because the school had not, by policy or practice, opened it up for indiscriminate public use. *Id.* at 267, 108 S. Ct. at 568. School officials had consistently treated the newspaper as a component of the journalism course, which was part of the curriculum taught at the school. *Id.* at 262-63, 108 S. Ct. 565.

Because the newspaper in *Hazelwood* was part of the curriculum, it bore "the imprimatur of the school" and entitled school officials to exercise greater control over it. *Id.* at 271, 102 S. Ct. at 570. The Court held that the school could censor the newspaper in order to disassociate itself from speech that would interfere with the school's work or impinge on the rights of others, or in order to correct "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* at 271, 108 S. Ct. at 570. In overseeing the newspaper, the school could "take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics." *Id.* at 272, 108 S. Ct. at 570. The *Hazelwood* decision establishes that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S. Ct. at 571.

The School Board in our case equates its

decision about which books to remove from school library shelves with the decision the principal made in *Hazelwood* about which articles to remove from the school newspaper. Both decisions, it asserts, relate to control over curriculum. [Board Br. 43-45] Alternatively the Board argues that, even if its decision to remove the *Vamos a Cuba* books were not curricular, its libraries are nonpublic fora and the book collection (and book removal) decisions of the Board should be treated as government speech. [*Id.* at 45-50] Government speech, we have said, is "expression delivered directly though the government or indirectly through private intermediaries." *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1213 (11th Cir. 2004). As the D.C. Circuit has explained, "in the case of a public library . . . there is still government speech. . . . [T]he government speaks through its selection of which books to put on the shelves and which books to exclude." *PETA, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005). The government's ability to limit speech in a nonpublic forum, however, is not unlimited. "The government can restrict access to [the] nonpublic forum 'as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78, 118 S. Ct. 1633, 1641 (1998) (alteration omitted).

The argument against applying the *Hazelwood* standard here is that this is not a school newspaper situation, and the speech at issue does not form part of a course of study in a

school's curriculum. This is a school library book case. The two situations may be sufficiently analogous to extend the *Hazelwood* standard here, or may not be. The question of what standard applies to school library book removal decisions is unresolved. And for reasons that will become apparent later we have no need to resolve it here.

Even if the plaintiffs won the argument about the applicable standard and got the one of their dreams, the furthest we could possibly go in their favor is the standard that failed to attract a majority in the *Pico* case: school officials may not remove books from library shelves "simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Pico*, 457 U.S. at 872, 102 S. Ct. at 2810 (plurality opinion of Brennan, J., joined by Marshall and Stevens, JJ., and in that part by Blackmun, J.). That is the standard the plaintiffs want. [ACLU Br. 35]

Even assuming that standard applies, however, the plaintiffs still lose if the School Board removed *Vamos a Cuba* not for those prohibited reasons but instead, as the Board insists, for legitimate pedagogical reasons such as concerns about the accuracy of the book. Whatever else it prohibits, the First Amendment does not forbid a school board from removing a book because it contains factual inaccuracies, whether they be of commission or

omission. There is no constitutional right to have books containing misstatements of objective facts shelved in a school library.

The plaintiffs do not dispute that the School Board may remove a book because it is educationally unsuitable. Nor do they dispute that one of the Board's written criteria for determining the educational suitability of a nonfiction book is factual accuracy. [Board Br. App.C:6A-1.26(IV)(A)(1)-(15), (VIII); ACLU Br. 6] What they dispute is the Board's actual motive for ordering *Vamos a Cuba* removed from the library shelves. They contend that the Board acted to suppress the viewpoint expressed in *Vamos a Cuba*. The viewpoint the plaintiffs ascribe to the book, and describe as content neutral and apolitical, is one in which the people of Cuba are portrayed as eating, working, and going to school like students in the Miami-Dade County School District do. *See ACLU*, 439 F. Supp. 2d at 1283. The Board's conclusion that *Vamos a Cuba* is inaccurate is, according to plaintiffs, nothing but a pretense for enforcing the politically orthodox view —especially prevalent in South Florida—that opposes the Castro regime. The Board responds that it decided to remove the *Vamos a Cuba* books because they were "inaccurate and rife with omissions in their portrayal of life in Cuba," and that reason "does not constitute viewpoint discrimination." [Board Br. 45]

The district court agreed with the plaintiffs. It found, for the purposes of the preliminary injunction, that "the majority of the Miami-Dade County School

Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision." *Id.* at 1283. The court also found "that the School Board's claim of 'inaccuracies' is a guise and pretext for 'political orthodoxy.'" *Id.*

B.

Ordinarily, we review district court factfindings only for clear error, but First Amendment issues are not ordinary. Where the First Amendment Free Speech Clause is involved our review of the district court's findings of "constitutional facts," as distinguished from ordinary historical facts, is *de novo*. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006) (*CAMP II*) ("We review the district court's determination of the 'constitutional facts' in a First Amendment case de novo.") (citation and quotation marks omitted); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1316 (11th Cir. 2000) (*CAMP I*) (same); *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1335 (11th Cir. 1998); *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) ("In cases involving [F]irst [A]mendment claims, an appellate court must make an independent examination of the whole record" and "is not bound by the 'clearly erroneous' standard of review.").

The plaintiffs contend that we should review only for clear error the district court's finding that

the Board acted with a political motive when it decided to remove *Vamos a Cuba* from the school libraries. [ACLU Br. 21] To support their argument that clear error review generally applies to the question of whether a defendant's motivation is unconstitutional, the plaintiffs rely on *Hatcher v. Board of Public Education*, 809 F.2d 1546, 1559 (11th Cir. 1987), and *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir. 2002). [ACLU Br. 20] Those cases involved claims that public employers retaliated against employees based on the employees' exercise of their First Amendment rights. However, neither of those cases held that an appellate court should apply the clear error standard to a district court's findings of fact about the employer's motive; they simply determined that motive is a fact question in retaliation cases. *See Hatcher*, 809 F.2d at 1556 ("Only the question of whether the conduct is protected by the First Amendment is a question of law; the other elements are questions of fact."); *Hoover*, 307 F.3d at 467 (labeling the district court's determination that there was no genuine issue of material fact as to the motivation element a "factual determination" for purposes of deciding whether there was interlocutory appellate jurisdiction to review the denial of qualified immunity).

The standard of review for factual determinations concerning motive in First Amendment retaliation cases has spawned some confusion. *See Bickel v. Burkhart*, 632 F.2d 1251, 1256 n.7 (5th Cir. 1980)[3[sic]] ("There is

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[3[sic]] In our en banc decision *Bonner v. City of Prichard*, 661 F.2d

some uncertainty as to the proper scope of appellate review of a trial court's resolution of this causation issue."); *compare Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1560 (11th Cir. 1995) ("[I]ssues of causation in a retaliatory discharge claim present questions of fact. In cases tried before a jury, the jury should decide questions of motive and intent behind a government employment decision."), *with Schneider v. City of Atlanta*, 628 F.2d 915, 920 n.4 (5th Cir. 1980) (describing motivation in retaliation claims as a "factual issue[]" but noting that "any factual issues decided by a jury that might relate to ultimate questions of law are nonetheless subject to careful review by the district court and this court which are invested with the power to conduct an independent review of constitutional claims when necessary" (citation and quotation marks omitted)), *overruled on other grounds by Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984).

Even if we were to assume that clear error is the proper standard of review for factual determinations involving motive in First Amendment retaliation cases, that does not mean that the same is true in non-retaliation cases. The law that applies in the present First Amendment case is different from that which applies in a retaliation case, and the Supreme Court has instructed us that when it comes to distinguishing

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1206, 1209 (11th Cir. 1981), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

between factfinding and application of legal rules to facts, "[w]here the line is drawn varies according to the nature of the substantive law at issue." *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 n.17, 104 S. Ct. 1949, 1960 n.17 (1984). The substantive law relating to the plaintiffs' First Amendment claim based on the School Board's decision to remove *Vamos a Cuba* differs from the substantive law of First Amendment retaliation claims in a way that makes *de novo* review appropriate in this case, even if it would not be in a retaliation case.

Our predecessor court explained what it labeled as a "strong argument" for why motivation in retaliation cases should be treated as "simply a question of fact reviewable under the clearly erroneous standard:"

> The question of whether an employee's speech was a substantial or motivating factor in an employer's decision to discipline the employee cannot similarly be described as one of ultimate fact, for it is not "the ultimate issue for resolution in this case"; rather, it is a preliminary issue, the resolution of which cannot provide grounds for the employee to recover unless (1) the speech is also found to be constitutionally protected, and (2) the employer does not establish that the same decision would have been made in the absence of the constitutionally protected speech.

Bickel, 632 F.2d at 1256 n.7. In this case by contrast, under the *Pico* plurality standard we are assuming applies, the Board's motive is the ultimate fact upon which the resolution of the constitutional question depends.

Under the *Pico* standard, the Board members violated the First Amendment if they removed *Vamos a Cuba* "simply because they dislike[d] the ideas contained in [the] book[]" and sought by its removal "'to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Pico*, 457 U.S. at 872, 102 S. Ct. at 2810 (plurality opinion) (citation omitted). Unlike the question of motive in retaliation cases, motive in this case is not just a preliminary issue. Instead, discerning the nature of the Board's motive will, under the standard we are assuming applies, determine the plaintiffs' First Amendment claim. "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S. Ct. 325, 327 (1951) (conducting in a First Amendment case an independent review of the record about a city counsel's motive for denying a license, and finding that "[t]he conclusion is inescapable that [a license for] the use of the park was denied because of the City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views").

The Supreme Court has explained that "the reaches of the First Amendment are ultimately

defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567, 115 S. Ct. 2338, 2344 (1995). As an appellate court we are "obliged to make a fresh examination of crucial facts" in order to resolve the First Amendment issue in this case. *See id.* at 567, 115 S. Ct. at 2344. Under the standard that we are assuming applies in this case, the School Board's motive in removing *Vamos a Cuba* is a constitutional fact, "a crucial fact" that determines the core issue of whether that removal violates the First Amendment.

Our own decisions illustrate this standard of review. In *CAMP I* a marijuana advocacy group challenged the City of Atlanta's festival ordinance as a prior restraint on the group's right to free speech and assembly. *CAMP I*, 219 F.3d at 1316. The district court concluded as part of its First Amendment analysis that the City did not intend through its festival ordinance to discriminate against the group's marijuana advocacy agenda. *See id.* at 1317. We did not limit our review of that dispositive finding to whether it was clearly erroneous because, as we explained, "we review the district court's determination of the 'constitutional facts' in a First Amendment case *de novo*." *Id.* at 1316. After examining the whole record to make our own findings about the constitutional facts, we said: "Like the district court, we conclude that, upon examining the intent behind the 2000

Festival Ordinance, it is evident that the City adopted the ordinance in an effort to manage effectively and efficiently the use of the City's parks and other resources by the sponsors of large festivals, not because of a disagreement with the message conveyed by any particular festival." *Id.* at 1317. Although we ended up agreeing with the district court about why the City had taken the challenged action, we did so only after examining the record and determining the City's motive for ourselves. We gave no deference to the district court's findings about that constitutional, or core, fact.

And in *Don's Porta Signs*, which involved a First Amendment challenge to a sign ordinance, we decided that "whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary" is a constitutional fact that we were required to decide for ourselves. *Don's Porta Signs*, 829 F.2d at 1053 n.9. Our decisions show that we treat the few core facts that determine a First Amendment free speech issue as "constitutional facts" subject to *de novo* review.

Here the district court's conclusion about motive was predicated upon its finding that "'inaccuracies'" were not the real issue and that *Vamos a Cuba* is apolitical:

> While the debate was couched in terms of "inaccuracies" contained in the Cuba Books, the real issue was that the Cuba Books were content-neutral and scrupulously apolitical, and did not

> reflect, as viewed by the majority of the School Board members, the true evil of Castro's government and the oppression of the Cuban people. Thus, the majority was significantly motivated to remove the books because of their disagreement with the content-neutral views expressed in the Cuba Books, essentially the view that "People in Cuba eat, play and go to school like you."

ACLU, 439 F. Supp. 2d at 1283. If inaccuracy was in fact the motivating concern behind the Board's action, the Board properly exercised its "substantial legitimate role . . . in the determination of school library content," *Pico*, 457 U.S. at 869, 102 S. Ct. at 2809 (plurality opinion). Under *Pico*, however, if the Board removed the book simply because it disliked the ideas contained in it and by removal of the book sought to prescribe political orthodoxy or other matters of opinion, *see id.* at 872, 102 S. Ct. at 2810, then the Board violated the plaintiffs' First Amendment rights. *See id.* at 871, 102 S. Ct. at 2810 ("[W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions."). Therefore, the "'conclusion of law as to a Federal right and [the] finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" *Bose*, 466 U.S. at 508 n.27, 104 S. Ct. at 1964 n.27 (quoting *Fiske v. Kansas*, 274 U.S. 380, 385-86, 47

S. Ct. 655, 656-67 (1927)). In such cases, the Supreme Court has instructed us to "'make an independent examination of the whole record,'" *id.* at 508, 104 S. Ct. at 1964 (citation omitted), and has recognized our "ultimate power . . . to conduct an independent review of constitutional claims when necessary," *id.* at 506, 104 S. Ct. at 1963 (citation and quotation marks omitted).

This "rule of independent review assigns to [appellate] judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or a trial judge." *Id.* at 501, 104 S. Ct. at 1959. In order to fulfill that esponsibility, we must review *de novo* the district court's findings about the Board's motive, which depends on constitutional facts rather than historical ones. *See CAMP II*, 451 F.3d at 1268; *see also CAMP I*, 219 F.3d at 1316; *Falanga*, 150 F.3d at 1335-36; *Don's Porta Signs, Inc.*, 829 F.2d at 1053 n.9.

Applying that approach here, we will review for clear error only the district court's findings of ordinary historical facts. Those are facts about the who, what, where, when, and how of the controversy—what the School Board did, when and how it acted, what various members of the Board said, and so forth. Those facts, already set out earlier in this opinion, are largely undisputed.

By contrast, under the assumptions about the law that we have made for purposes of deciding this case, we must determine the "why" facts. Those are the core constitutional facts that involve the reasons the School Board took the challenged

action—its intent, or more accurately, its motive for removing copies of the *Vamos a Cuba* book from the school libraries. The Board insists that it ordered *Vamos a Cuba* removed from the school libraries because the book contains factual errors and does not present an accurate picture of life in Cuba. The plaintiffs counter that the Board's real motive for wanting to get rid of the book is to promote political orthodoxy because the Board disagreed with the book's viewpoint, which the plaintiffs characterize as one of political neutrality toward Cuba. The argument about inaccuracies, the plaintiffs say, is just pretext, a cover for the anti-Castro goals of the Board. We must determine "the decisive factor" that motivated the Board. *Pico*, 457 U.S. at 871, 102 S. Ct. at 2810.

We must find the disputed "why" facts—the motive facts—ourselves, as though the district court had never made any findings about them. Here the record as a whole includes the proceedings of the School Committee and the District Committee, both of which made recommendations about *Vamos a Cuba*; the superintendent's correspondence with those committees and with the Board; the transcripts of the Board's proceedings; and the evidence presented by the Board and by the plaintiffs at the preliminary injunction hearing in the district court. Our primary disagreement with the dissent is about the "why" facts, the motive behind the School Board's removal of the books from its library shelves. *See* Dissenting Op. at 126 n.3 ("My dispute with the majority is not about 'what

the Constitution obligates' but instead what the evidence shows motivated the School Board to make its removal decision.").

The dissent believes that "viewpoint discrimination was the decisive factor in [the Board's] motivation." Dissenting Op. at 128. Our review of the record leads us to the conclusion that under the *Pico* standard we are assuming applies, the Board members did not "remove books from school library shelves simply because they dislike[d] the ideas contained in those books and [sought] by their removal to prescribe what shall be orthodox in politics . . . or other matters of opinion." *Pico*, 457 U. S. at 872, 102 S. Ct. at 2810 (quotation marks omitted). Under that standard, a school board's removal motive is unconstitutional if it is based on "simply" disliking ideas contained in the books *and* on seeking to prescribe what shall be orthodox in matters of opinion. *See id.*, 102 S. Ct. at 2810. The record shows that the Board did not simply dislike the ideas in the *Vamos a Cuba* book. Instead, everyone, including both sides' experts, agreed that the book contained factual inaccuracies. *See infra* at 80-86. Factual accuracy in a non-fiction book is not a "matter[] of opinion." *See Pico*, 457 U. S. at 872, 102 S. Ct. at 2810. Under the *Pico* standard we are applying, the Board did not act based on an unconstitutional motive.

C.

The initial complaint that started the process of removing *Vamos a Cuba* from the school district's libraries came from a parent of an

elementary school student, not from any member of the School Board. [R:19:Ex.32] The parent, Juan Amador, stated in his complaint to the principal that he found the material in *Vamos a Cuba* "untruthful," "illus[ory]," and a "distort[ion] [of] reality." [*Id.*] According to Amador, *Vamos a Cuba* "portrays a life in Cuba that does not exist." [*Id.*] Amador did not request that the library ban books on Cuba; instead, he asked that *Vamos a Cuba* be replaced with "[a]ny material that truly reflects the plight of the Cuban people of the past and present." [*Id.*]

Following established procedures [R:19:Ex.11: 87-88], the School Committee members reviewed the challenged book by using unsigned evaluation forms. [See R:19:80-87] One of the eight members of the School Committee commented that *Vamos a Cuba* lacked literary merit and technical quality and that the "[a]uthor could have better researched her topic." [*Id.* at 83] Another committee member, who wrote an evaluation in Spanish, noted that *Vamos a Cuba* did "not meet" the School Board's "criteria" for "accuracy" and "literary merit," and specifically noted that pages four, five, nine, ten, seventeen, twenty-five, and twenty-eight of the thirty-two page book contained factual errors. [*Id.* at 87-88] Five of the evaluation forms stated that the book was "apolitical" or that it had no "political slant" or "political implications." [R:19:80-88] Another one emphasized that the book did not have "*direct* political implications." [R:19:86] One School Committee member commented that the book was "appropriate for the age group," but also stated

that the "author could have better written and researched the topic." [R:19:82]

The District Committee conducted the next level of review for *Vamos a Cuba*, and some members had concerns about its accuracy. At that committee's first meeting, Mr. Rivera, a member, stated that: "[T]he book *A Visit to Vietnam*, when compared to *A Visit to Cuba*, contains more specific information and has more accuracy whereas, *A Visit to Cuba* detracts [sic] factual information and contains inaccuracies when comparing formulaic sentences." [R:19:59] Another member, Dr. Usatagui, likewise commented that "the information presented in the ["A Visit to" series] were not presented equally." [*Id.*] Dr. Usatagui, who is a child psychiatrist, was particularly concerned about the inaccuracies of *Vamos a Cuba*. [*Id.* at 59-60] She remarked that one inaccuracy was the title of the book because Cuba is not a country that a person is free to visit. [R:19:59] None of the other members voiced objections to the book at that first meeting. [R:19:56-60] In a memorandum to the superintendent of schools, Antoinette Dunbar, who was chairperson of the District Committee, stated that the minutes from the District Committee's second meeting were "not available." [R:19:18] However, Chairperson Dunbar summarized the District Committee's complete proceedings as follows:

> There was much discussion regarding the accuracy of the books, the sensitivity of the topic in regard to the community, and the differences

> between the English and Spanish text. Much of the dialogue focused on accuracy versus omissions, with the debate centering on the issue of missing facts versus how much and what type of information are meant to be contained in the book for very young children.

[*Id.*] The District Committee was presented with but did not have a chance to fully consider a report [R:19:47-48] about the book written by Dr. Juan Clark, professor emeritus at Miami-Dade College.[4] [*Id.* at 35]

During the District Committee's review of *Vamos a Cuba*, the superintendent wrote a letter to Chairperson Dunbar recommending that the school district "identif[y] immediately" "[o]ther materials that present a more accurate and complete description of life in Cuba" to "be made available

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[4] Evidence was presented at the preliminary injunction hearing indicating that the District Committee did not fully consider Dr. Clark's report. Ronald Bilbao, a member of the District Committee, stated in his declaration that Dr. Usatagui distributed the report to the committee and asked everyone to read it while the committee was "trying to review the minutes." [R:19:232] But Dr. Usatagui herself testified that she introduced the report for the District Committee's consideration but believed that the committee "failed to adequately take the report into consideration when analyzing the suitability of the Cuba Books." [R:27:130] Antoinette Dunbar testified that as chairperson of the District Committee, she "did not allow" the committee to take Dr. Clark's analysis and report into account. [R:62:53] The upshot is that the District Committee did not fully consider evidence that the School Board had before it concerning the inaccuracies in *Vamos a Cuba*.

immediately in library media centers with *Vamos A Cuba/A Visit to Cuba* in their collections." [R:19:49] The superintendent also recommended that a statement be placed in the inside cover of every *Vamos a Cuba* book in the district's libraries "explain[ing] to students and parents that statements in those books are incomplete or inaccurate in many cases and [directing] them by title to the alternate materials that have been identified as more factually correct and complete descriptions of life in Cuba and are available in their school's library media center." [*Id.*] The superintendent proposed the following language for the notice inside the *Vamos a Cuba* books:

> ATTENTION STUDENTS AND PARENTS
>
> This book was purchased by your school as part of a series of books on many foreign countries. Some of the information provided in this book about life in Cuba under that nation's communist dictatorship is incorrect or incomplete enough to be inaccurate. For an accurate depiction of life in Cuba, Miami-Dade County Public Schools recommends the following books that can be found in this school's library.
>
> • *Cuba for Kids* by Ismael Roque-Velasco

[*Id.* at 51] Finally, the superintendent recommended that the school district permit

Vamos a Cuba to be checked out only with parental consent. [*Id.* at 49]

This was the situation at the time the School Board made its decision about *Vamos a Cuba*. The Board knew that a parent of a student had found the book to be inaccurate [R:19:296] and that some members of both the School Committee and the District Committee had concerns about the book's inaccuracies, although a majority of each had recommended leaving the book on the shelves. Two members of the School Committee commented that the book could have been better researched [*Id.* at 82, 83], and one found that it was inaccurate. [*Id.* at 87] A child psychiatrist who was a member of the District Committee had voted for removal of the book based on its inaccuracies, which she believed were harmful to children. [R:27:129-30] The superintendent had expressed concern about the book's distortions and inaccuracies. [R:19:222] He had recommended to the District Committee that access to *Vamos a Cuba* should be permitted only with parental consent, and even then, that the book should carry a disclaimer stating that it is inaccurate. [*Id.* at 222-24] Dr. Clark, an expert on modern Cuba, had appeared before the Board and informed it of his opinion that the book was rife with inaccuracies. He told Board members:

> Having examined this book aimed at young children, I have found various degrees of serious distortions in 13 of it[s] 29 pages. It ultimately attempts to equate Cuban social conditions to those

> of this country. Distortion of reality can take place by sheer lies or by omission. The book errs mostly by omission.

[*Id.* at 307]

There are nine members of the School Board. [*Id.* at 392] The vote to remove *Vamos a Cuba* was six to three. [*Id.* at 449] Five of the six members voting to remove it explained that they were doing so because of inaccuracies in the book.[5] Board Chairperson Barrera stated that:

> The issues before us, to me are quite clear, it's issues of inaccuracies, it's issues of omissions, because sometimes the words that are not said are more powerful than those words which are said, and sometimes there's generalities, which [is] how this book is portrayed. . . .
>
> I cannot support the recommendations that are made here today by the superintendent. What I can support is the replacement of this book with a book that really talks about the richness and the culture that the Cuban people have lived and, if it was up to me, I would replace the whole series, because those books do not do justice to those 24 countries, and I think we owe it to the students

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[5] When asked how he was voting, the sixth member said he was "voting for the cause. I['m] voting for The American Civil Liberties Union to file a lawsuit on us." [R:19:459-60]

> in Miami-Dade County public schools to give them the best education possible.

[*Id.* at 399, 405] Board member Logan explained that she "looked at the book" and found it "extremely offensive, inaccurate, full of omissions." [*Id.* at 407] The other books in the "A Visit to" series, she said, "also have omissions." [*Id.*] She proposed "to replace the series with a new and updated series." [*Id.* at 408]

Board member Bolanos explained that:

> We specifically mentioned School Board Rule 6G13, 6A126 that puts in place and sets forth clear educational standards that must be met by books that are placed in our public school library. [*Vamos a Cuba*] does not meet those standards, that is crystal clear. . . .
>
> And if we recognize as, even members of the committee that looked at this book, as the superintendent has recognized when he made an offer to place a label of distinction and separation o[n] the book, if we recognize that this book due to its acts of commission, and omission does not teach our children the truth about Cuba, then it should be removed from our public school libraries, we have that sacred responsibility.

[*Id.* at 409-10] Board Vice-Chairperson Hantman explained that she could not "support the presence of

a book in our school that creates a misleading and inaccurate portrait of Cuba." [*Id.* at 414] She continued:

> And I read [*Vamos a Cuba*], and in many pages, I would say at least 14 omissions or statements that are not true, so that's why I said that this is not about censorship or banning. This is about a book that is not accurate, and there's nothing that—I cannot support this book in our libraries.

[*Id.* at 414-15] Board member Perez adopted the comments she made at an earlier Board meeting on the issue of removing *Vamos a Cuba* from the district libraries. [*Id.* at 416] At that earlier meeting, Perez had explained that:

> The school boards possess significant discretion to determine the content of their school library. Which is why we don't have pornography and those other things. It says, this discretion may not be exercised in a narrowly partisan or in a political manner. . . .
>
> That is not what this is about. And so, in my opinion, I believe that if this publisher wants to publish [*Vamos a Cuba*] and if it is available for sale, that's all right. I don't necessarily want it, or want my children perhaps to read it. I can understand and defend their right to sell it. But when

> we choose books in a content and say to children, these are the books that we as adults have chosen for you, I do not believe that this is an appropriate book.

[*Id.* at 358-59]

Even one of the three Board members who voted to retain *Vamos a Cuba* in the district's libraries acknowledged that there were factual errors in the book. He stated that "the author's intent in *Vamos a Cuba* was not to say anything about the politics of the country . . . but sometimes . . . when you do not say anything or avoid addressing real problems, you say a lot." [*Id.* at 426-27] He continued:

> I believe the proper way for an education system to handle this is to give our children a more accurate, age appropriate picture.
>
> Some of the ideas could include preparing a supplementary guide for parents to use with the book. The parent guide could address each and every inaccuracy, and be required with each checkout. Another idea is to have parent consent forms that would ensure that parents whose children check out this book will be able to review all of the material. Another way that may ensure a complete and accurate picture that is age appropriate is to consider providing the companion book with the

check out.

> By adding additional resources, such as the supplementary parent guide, we can not only address what *Vamos a Cuba* did not say, but it will also allow our children to learn that not all sources are complete and accurate.

[*Id.* at 427] Of the other two members voting against removal, one said nothing. The other said that she was deferring to the opinion of the committees. [*Id.* at 34-35]

The Board's formal order stated *Vamos a Cuba* was being removed because the Board had found that "the book is inaccurate and contains several omissions." [*Id.* at 172] The order required that *Vamos a Cuba* "be replaced, throughout the school district, with a more accurate set of books that is more representative of actual life" in Cuba. [*Id.*]

The consistency throughout the process of the inaccuracy complaints and the consistency of the explanations of the Board members who voted to remove the book evidence that the Board's motive was what it stated—that the book was ordered removed from school libraries because it is full of factual errors.[6] And there is more evidence.

D.

A fact of great significance in deciding whether

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[6] The dissenting opinion, like the district court's opinion, ignores many of these statements and much of the other evidence that we set out in this opinion.

the School Board was motivated to remove *Vamos a Cuba* because of inaccuracies is that the book indisputably does contain inaccuracies. It is inaccurate because of what it says. It is inaccurate because of what it does not say. In recounting its factual errors, we will begin with the misstatements of the more mundane facts and move from there to misstatements of more import, which overlap to a large extent with the omission inaccuracies.[7]

Page 29 of the English version of *Vamos a Cuba* states: "In one valley in Cuba, there are large, colorful paintings on some rocks. Inside the rocks are caves. The caves have paintings made by people who lived in Cuba about 1,000 years ago."[8] [R:28:A Visit to Cuba:29] The book includes a picture of a rock painting that depicts people and animals in red, blue, green, and purple. [*Id.*] It is undisputed, however, that the rock painting in the picture was not created "by people who lived in Cuba about 1,000 years ago"

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[7] The assertion that Vamos a Cuba is nothing more than "a superficial geography book," Dissenting Op. at 160, is not accurate. Geography is primarily about the earth's surface—mountains, rivers, plains, and other physical features of a country. It is not about the daily lives of people in a country and whether they face hardships. While Vamos a Cuba contains some statements about the country's geography, the majority of the statements in the book are about the people there and how they live. Regardless of how the book is classified, its assertion that life in Cuba is "like" life in this country goes beyond a discussion of the geographic features of either country.

[8] The second sentence in this quote is not our typo. The book actually does state that "[i]nside the rocks are caves," instead of the other way around.

as the book indicates. Instead, the painting, "called *Mural de la Prehistoria*, which is located in the Valle de Vinales in Pinar del Rio," was done in the 1960s. [R:19:48] (Some Cuban caves have prehistoric paintings, but not the one pictured in the book. [*Id.* at 278])

On page 25 of *Vamos a Cuba*, the book states: "Cuba's beaches are good for swimming and boating. People like to dive and fish. There are also rowboat and sailboat races." [R:28:A Visit to Cuba:25] The truth, according to the uncontradicted evidence in the record, is that the traditional Cuban rowboat and sailboat races were abolished a half century ago. [R:19:48]

On page 15 of the book, it says: "For special festivals, men wear white pants and white shirts. Women wear colorful ruffled dresses." [R:28:A Visit to Cuba: 15] The implication is that this type of clothing is worn on festival days by a large segment of the population. The truth, according to the evidence in this record, is that the "vast[] majority of Cubans lack adequate clothing" and cannot afford this type of outfit.[9] [R:19:47]

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[9] The dissenting opinion asserts that *Vamos a Cuba* actually depicts Cuba as a poor country "with children missing articles of clothing (on page 10 a young boy is shirtless and on page 19 a boy is shirtless and shoeless)." Dissenting Op. at 160. The young boy on page 10 is walking on a sidewalk, wearing modern looking tennis shoes and overalls, albeit without a shirt. The boy on page 19, who is working on a farm, is not wearing a shirt or shoes. That boys in a semi-tropical country sometimes do not wear a shirt and occasionally go barefooted—what the dissenting opinion characterizes as "missing articles of clothing"—does not, of course, imply that it is a poor country. As page 14 of the book says: "Cubans dress to keep cool in

The third sentence in the book tells the children of this country that: "People in Cuba eat, work, and go to school like you do." [R:28:A Visit to Cuba:5] It is simply not true that people in Cuba "eat, work, and go to school" the same way that American children do.

As for eating, unlike the situation in this country, in Cuba food is rationed by the government. It has been for forty-six years. [R:19:47] The book fails to mention that. In another place the book states that: "[m]any kinds of fruits grow in Cuba," and that "[b]ananas, pineapples, oranges, and mangoes are favorites." [R:28:A Visit to Cuba: 13] While these fruits are indeed grown in Cuba and may be favorites, the implication that Cubans get to enjoy them is misleading. The population generally does not have free access to them because most of the fruit that is produced is exported, and the fruit that is not shipped out of the country is rationed by the government. [R:19:216] The evidence in the record indicates that malnutrition is not uncommon among the children of Cuba. [*Id.*] They do not eat like the children of this country do.

As for the Cuban people "working like you do," that is not true for children or adults. In Cuba there is "little private work," and "it [is] a crime to exercise private initiative or to have private practice of a profession." [*Id.*] "Practically

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the hot weather." In any event, the book simply does not depict substandard clothing on either children or adults. Nor does a single photograph of an early model car describe with anything approaching accuracy the country's problems.

everyone must work for the government." [*Id.*] From the sixth grade on, students must go to the countryside for a period of 45 days to do unpaid agricultural work. [*Id.* at 48] Moreover, "from the senior high level, all must go to the countryside to do unpaid agricultural work, on a permanent basis, alternating half day in the fields and half in the classroom." [*Id.*] Refusal to do agricultural work may result in expulsion from school. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Cuba: Country Reports on Human Rights Practices 2006 (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78887.htm (last visited Dec. 8, 2008).[10] The book does not mention that.

Page 23 of the English version of *Vamos a Cuba* does acknowledge that: "All schoolchildren do some kind of work during their school day. Some children work in gardens. Older children may work in factories." [R:28:A Visit to Cuba:23] But even that nod toward reality is not accurate. Cuban children do not work in gardens, as the book says, but instead perform manual labor in the countryside doing unpaid agricultural work. [R:19:48] As the State Department's report on Cuba reveals:

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[10] A 2008 Country Report on Cuba has now been issued; however, we refer to the 2007 Report because it details conditions in Cuba in 2006, which is the year the School Board made its decision to remove *Vamos a Cuba* from its libraries. The 2008 Report is not substantively different from the 2007 Report. [Hard copies of the internet materials cited in this opinion, including the 2006 and the 2007 Country Reports on Cuba, are on file at the Eleventh Circuit Court of Appeals Clerk's Office.]

> Secondary school students were expected to devote up to 15 days of their summer vacation completing a variety of tasks ranging from farm labor to urban cleanup projects and were paid a small wage for this labor. Students in postsecondary institutions (technical schools, university preparatory schools, and agricultural institutes) were expected to devote 30 to 45 hours per year to primarily agricultural work. Refusal to do agricultural work could result in expulsion from school.

Cuba Human Rights Report, *supra*.

The book's assertion that people in Cuba go to school "like you do" is false, too. In addition to agricultural field work being a mandatory part of school for Cuban children, the Human Rights Report found that elementary and secondary students receive "obligatory ideological indoctrination." *Id.* Throughout the educational system, academic freedom is restricted and revolutionary ideology and discipline are reinforced. *Id.* Advancement in the school system "depend[s] on participation in political activities." *Id.* As the report detailed, in Cuba:

> The government maintained a dossier on every child from kindergarten through high school, which included a record of the child's participation in political activities, such as mandatory marches. Full participation in political activities, such as membership in the Union of Pioneers of Cuba, a regimented

> youth organization used by the government for political indoctrination, was essential to advance in the school system.

Id.

According to page 22 of *Vamos a Cuba*, "Cuban children go to school between the ages of five and fourteen." [R:28:A Visit to Cuba:22] That is not completely true. The record in this case establishes that some children go to school beyond the age of fourteen, but only if the student does not have "a 'political stain,'" the absence of which "is crucial to have access to the university level, since 'the universities are for the revolutionaries.'" [R:48] *See* Cuban Human Rights Report, *supra* ("Full participation in political activities . . . was essential to advance in the school system.").

What *Vamos a Cuba* fails to mention, and takes great pains to cover up with its "like you do" misrepresentations, is that the people of Cuba live in a state of subjugation to a totalitarian communist regime with all that involves. *See generally*, *e.g.*, *Gonzalez v. Reno*, 212 F.3d 1338, 1350 & n.14 (11th Cir. 2000) (noting that the INS had determined that Cuba is "a communist-totalitarian state," and quoting the U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) for the proposition that "Cuba is a totalitarian state," where the Communist Party "exercises control over all aspects of Cuban life"); *Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008) (referring to

"totalitarian Cuba's forced labor system"); *Rodriguez v. Ridge*, 310 F. Supp. 2d 1242, 1246 (S.D. Fla. 2004) (referring to "the dictatorial regime that . . . is Cuba"); *Zappa v. Cruz*, 30 F. Supp. 2d 123, 139 (D.P.R. 1998) ("Since 1898, Cuba, without benefit of the United States Constitution, has wallowed in poverty and corruption, mostly under dictatorial rule."); *see also* Cuba Human Rights Report, *supra* ("Cuba, with a population of more than 11 million, is a totalitarian state led by an acting president, General Raul Castro.").

The following summary of Cuban life is from the State Department's Human Rights Report on Cuba that describes the situation in 2006, the year that the School Board determined *Vamos a Cuba* does not accurately portray life in Cuba:

> The government's human rights record remained poor, and the government continued to commit numerous, serious abuses. The government denied citizens the right to change their government. There were at least 283 political prisoners and detainees at year's end. Thousands of citizens served sentences for "dangerousness," in the absence of any criminal activity.
>
> The following human rights problems were reported: beatings and abuse of detainees and prisoners, including human rights activists, carried out with impunity; harsh and life-threatening

> prison conditions, including denial of medical care; frequent harassment, beatings, and threats against political opponents by government-recruited mobs, police, and state security officials; frequent arbitrary arrest and detention of human rights advocates and members of independent professional organizations; denial of fair trial, particularly to political prisoners; and interference with privacy, including pervasive monitoring of private communications.
>
> There were also severe limitations on freedom of speech and press; denial of peaceful assembly and association; restrictions on freedom of movement, including selective denial of exit permits to thousands of citizens; and refusal to recognize domestic human rights groups or permit them to function legally. Domestic violence, underage prostitution, sex tourism, discrimination against persons of African descent, and severe restrictions on worker rights, including the right to form independent unions, were also problems.

Cuba Human Rights Report, *supra* (paragraph breaks inserted). Life in Cuba is not like life in the United States.

As to underage prostitution and sex tourism, the report explains:

> Child prostitution was a problem, with young girls engaging in prostitution to help support themselves and their families . . . . While underage prostitution was widely apparent, there were no reliable statistics available regarding its extent. . . . Minors played a key role in the country's thriving sex trade, which was fueled by visits by thousands of foreign tourists. There was anecdotal evidence that state run hotel workers, travel companies, taxi drivers, bar and restaurant workers, and law enforcement personnel were complicit in the commercial sexual exploitation of children. . . . Sex tourism revenues provided an important, indirect source of hard currency to the government.

Id. It simply is not true, as *Vamos a Cuba* asserts, that the lives of children in Cuba are like those of children in this country.

E.

There was no evidence at the preliminary injunction hearing that the picture of life in Cuba that *Vamos a Cuba* presents is an accurate one. No one who testified there stated, or even suggested, that it is. To the contrary, the evidence at the hearing proved beyond dispute that the book contains substantial factual errors. At the hearing six expert witnesses—three for each side—testified through declarations, affidavits, live testimony, or a combination of those

methods. [*See generally* R:62(Hearing Tr.)] None of them testified that *Vamos a Cuba* is accurate.[11]

Dr. Juan Clark, a Miami-Dade College professor emeritus, testified that "[t]he fundamental flaw in the Cuba Books is that they fail to fairly and accurately portray life in Cuba and contain blunt inaccuracies regarding that country. Therefore, the Cuba Books utterly fail to help their readers understand what it's like to be an average person or a child living in Cuba." [R:27:App.B:3] On cross-examination, Dr. Clark testified that *Vamos a Cuba* "omits or hides a crucial dimension of Cuban reality which makes it unique among all the nations in this hemisphere, and I would say around the world with the exception of North Korea." [R:62:132] Dr. Clark also prepared a written report that detailed inaccuracies on

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[11] While never contesting any of the statements or testimony about how bad life in Cuba is, the dissenting opinion appears to suggest that the reality is relative. It puts the word in quotation marks when recounting the statements of School Board member Frank J. Bolanos about the factual distortions in the book. Dissenting Op. at 137 ("Each 'reality'"); *id.* at 137 ("His corresponding 'reality'"); *id.* at 138 (same twice). The reality Bolanos described is that the people of Cuba are deprived of civil liberties and due process of law; they can lose their jobs or be sentenced to prison for voicing an opinion contrary to the party line; they are told where to work; the children of that country are indoctrinated and forced to chant Castro's greatness in class; and food is rationed. *Id.* at 137-38. We disagree with the suggestion that this is just the "reality" of Mr. Bolanos. It is the reality of everyone who spoke on the subject during the Board meeting or testified at the preliminary injunction hearing, and it is also the reality of the State Department, as illustrated in its official country report on Cuba. *See supra* at 75-79. So far as we know, no one questions this reality. *See* Dissenting Op. at 139 ("Indeed, life in Cuba is as bad as Mr. Bolanos makes it out to be.").

thirteen of the thirty-two pages of *Vamos a Cuba*. [R:19:47–48] He concluded that his "overall assessment indicates the presence of a considerable amount of inaccuracies" in the book. [*Id.* at 47]

Dr. Usatagui, a child psychiatrist and the only member of the District Committee to vote for removal of *Vamos a Cuba*, [R:27:129:¶ 14] testified at the preliminary injunction hearing that in her professional opinion presenting inaccurate information to children under the guise of "nonfiction" is damaging:

> [I]t is entirely inappropriate to teach or use an inaccurate book to instruct children on geography or any other subject. This is especially true with respect to nonfiction and factual educational materials, regardless of whether they are intended to be introductions to the subject matter.
>
> The need for accuracy in factual information is especially true and of utmost importance for five to seven year-olds, because they are very impressionable. Children in this age group accept what they are exposed to at face value and are unable to question or challenge it. Five to seven year-olds do not have the cognitive ability to analyze and discern falsehoods from truth. For this reason, children five to seven years-old cannot ascertain the accuracy of the content in the Cuba books.

> Moreover, it is damaging to children to present them with inaccurate information. This results in confusion for the children, especially when subsequently exposed to accurate information.

[*Id.* at 128 (para. numbering omitted)]

Dr. Lisandro Perez, an expert who testified for the plaintiffs, agreed that *Vamos a Cuba* contains inaccurate information: "To be sure, there are some inaccuracies in the book." [R:19:277:¶7] However, he believed that such inaccuracies are of "little consequence." [R: 19:275:¶5(a)]

The real debate among the experts in the case, who all agreed that *Vamos a Cuba* was inaccurate, had to do with educational suitability. The experts disagreed about whether a truthful account of life in Cuba could be presented in an age-appropriate way.

Dr. Usatagui testified that in her opinion accurate information about Cuba could be presented in a book written for elementary school children in a manner that would be age appropriate:

> I do not suggest necessarily that children ages five to seven have to be presented with facts on malnutrition, forced labor, and deprivation of civil liberties—since these are difficult concepts for this age group. These facts might be presented in a manner that is age-appropriate, such as when children learn about the hardships of

> other children by participating in activities that help underprivileged children, such as toy drives. This way, children begin learning how to help and care for others in an age appropriate manner. In contrast, I find that in the Cuba books, children are improperly taught facts about Cuba that are false and misleading.

[R:27:129:¶ 12]

One of the plaintiffs' experts, former school librarian Pat Scales, [R:19:250] agreed that certain realities about life in Cuba could be presented in an age appropriate way. She testified:

> Q: And my question for you is: Would it be inappropriate? Would it be providing too much information to say that some children in Cuba are poor?
>
> A. That's not too much information, but I think that's in that book, in the photographs.
>
> Q. Okay. And would it be too much information to say some children in Cuba don't have enough to eat?
>
> A. I'm not sure that's what this book is about.
>
> Q. I'm asking you if it would be too much information?
>
> A. Not to state it in that way.
>
> * * * *

Q. And the determination about how much information is appropriate to present to children necessarily involves some line drawing, correct?

A. Yes.

Q. And reasonable people could disagree about where exactly you draw that line, correct?

A. Yes.

[R:62:113-14]

Dr. Perez opined that the reality of life in Cuba is not appropriate subject matter for the readership of *Vamos a Cuba*:

> Rationing of consumer goods, indoctrination in schools, limitations and prohibitions on entrepreneurship, urban decay, government-controlled markets, austerity in dress, overcrowded mass transit, tourist-only beaches, exclamations of religious fervor before firing squads, the politicization of university admissions, and more, have been part of the reality of Cuba. But are those topics appropriate for a book for this readership and purpose? Can those topics be appropriately handled in a book that, because of its intended readership, only has sixty-five sentences? Is it appropriate for a book series that teaches young children elementary notions of national

> culture and society to present Cuba as a hellhole (which is apparently what the detractors would like)?

[R:19:278:¶ 8]

Similarly, plaintiffs' expert Lucia Gonzalez testified that because of its target audience, the book necessarily had to present an incomplete picture of life in Cuba:

> Q. Okay. Just to be clear: Your understanding is that the book is meant to offer information about the way of life in Cuba; is that correct?
>
> A. My understanding is the book offers basic facts about the way of life in Cuba. It is very limited because of the size of the book and the grade level that it's aimed at. The target age, of course, is very limited.

[R:62:84]

Contrary to Dr. Perez's and Ms. Gonzalez's apparent assumption, some of the other books in the "A Visit to" series, which are aimed at the identical age group, do contain information similar to that which they asserted would not be age-appropriate in *Vamos a Cuba*. The book *A Visit to Cambodia* tells its audience: "Not all young people can go to school. There has been war in Cambodia for more than 20 years. Many schools have been destroyed." [R:28:A Visit to Cambodia at 23] Despite providing this information, the Cambodia book also tells children that "Cambodians

travel and go to school like you." [*Id.* at 5] Similarly, *A Visit to India* informs children: "Many children are too poor to go to school. Their families need them to stay at home. The children help farm or they beg in the streets." [R:28:A Visit to India at 23] Nonetheless, the book also proclaims that "Indians eat, sleep, play, and go to school like you." [*Id.* at 5] Inexplicably, only the "A Visit to" books on England, Scotland, Wales, and Canada do not contain the "like you" formula language. [*See* R:28]

The district court concluded that the "like you" statement in *Vamos a Cuba* was "apolitical and content-neutral." *ACLU*, 439 F. Supp. 2d at 1283. The reality, however, is that regardless of politics the "like you" representation is inaccurate. All of the experts in this case agreed that people in Cuba do not live like people in the United States. As the plaintiffs' own expert explained, they don't because "[r]ationing of consumer goods, indoctrination in schools, limitations and prohibitions on entrepreneurship, urban decay, government-controlled markets, austerity in dress, overcrowded mass transit, tourist-only beaches, exclamations of religious fervor before firing squads, the politicization of university admissions, and more, have been part of the reality of Cuba." [R:19:278:¶ 8]

Although everyone agreed that *Vamos a Cuba* contains inaccuracies, the district court still concluded that "ban[ning] books because of perceived inaccuracies sweeps too broadly." *ACLU*, 439 F. Supp. 2d at 1284. There are

two fundamental flaws in that characterization. For one, the inaccuracies were not merely "perceived." They were undisputed. For another thing, the book was not being banned. It was being removed from a school's library shelves. The book could still be found in public libraries in the area, and it was available for purchase from any of several online book sellers.[12]

Nonetheless, the district court characterized the Board's removal of *Vamos a Cuba* as book "banning." [See, e.g., ACLU Br. 18, 21, 32] See ACLU, 439 F. Supp. 2d at 1279 ("Here, by totally banning the Cuba Books and the rest of the Series, the School Board is in fact prohibiting even the voluntary consideration of the themes contained in the books by students at their leisure."); *id.* at 1284 ("To ban books because of perceived inaccuracies sweeps too broadly."). The dissenting opinion not only adopts that pejorative label from its very first sentence, but also builds its entire attack on the Board's action on the premise that this case involves book banning. *See* Dissenting Op. at 118, 137, 147, 167-74. That is a faulty foundation. The Board did not ban any book. The Board removed from its own school libraries a book that the

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[12] *Vamos a Cuba* remains available for purchase from various online book vendors, *see, e.g.*, Amazon.com: *Vamos a Cuba*, http://www.amazon.com/Vamos-Cuba-Visit-Spanish/dp/1575723840 (last visited Dec. 10, 2008); *see also* Abebooks.com,http://www.abebooks.com/servlet/SearchResults?sts=t&tn=vamos+a+cuba (last visited Dec. 10, 2008). According to plaintiffs' own expert, Lucia Gonzales, the book is available in public libraries; she found it in the Broward County library system. [Doc. 19:267, ¶ 15]

Board had purchased for those libraries with Board funds. It did not prohibit anyone else from owning, possessing, or reading the book.

The overwrought rhetoric about book banning has no place here. Book banning takes place where a government or its officials forbid or prohibit others from having a book. That is what "ban" means. *See Webster's New Twentieth Century Dictionary* 144-45 (1976) (defining "ban" as "to prohibit" or "to forbid"); *see also Black's Law Dictionary* 154 (8th ed. 2004) (defining "ban" as "[t]o prohibit, esp[ecially] by legal means"). The term does not apply where a school district, through its authorized school board, decides not to continue possessing the book on its own library shelves. The School Board is the entity that has the ultimate authority to decide what books will be purchased and kept on the shelves of the schools in the district. *See, e.g.*, Fla. Stat. § 1001.32(2) (providing that "district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law"); *see also id.* § 1006.28(1)(d) (assigning to district school boards the duty to "[e]stablish and maintain a program of school library media services for all public schools in the district"). The School Board could have decided not to purchase and shelve *Vamos a Cuba* in the first place. *See Pico*, 457 U.S. at 871, 102 S.Ct. at 2810 ("As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the

libraries of their schools."). Unless deciding not to purchase a book is an act of banning it, and no rational person would suggest it is, removing a book from one's own shelves is not book banning either.[13]

In an attempt to defend the district court's and its own use of the "banning" rhetoric, while at the same time dismissing our disagreement with it as "largely semantical," the dissenting opinion quotes the same dictionary definition of "ban" that we have but attempts to contort that definition to fit the facts of this case. *See* Dissenting Op. at 168. The dissent asserts that by removing the book from its own school library shelves the Board did "prohibit, by legal means, public school libraries from carrying *Vamos a Cuba*." *Id.* at 168. That assertion ignores the fact that the Board, and the Board alone, has the responsibility and authority under Florida law to decide what books are to be on the shelves of the school libraries in its district. *See supra* at 87-88. The school libraries are under the control of the Board and their employees are employees or agents of the Board. *See id.* When viewed in that light, as it must be, the dissent's insistence that the Board has banned the book amounts to arguing that when an entity decides to remove a book from its own library

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[13] We are reminded of Justice O'Connor's wise observation that: "If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it." *Pico*, 457 U.S. at 921, 102 S. Ct. at 2835 (O'Connor, J., dissenting).

shelves it has banned itself from having that book there. The dissent openly asserts as much. *See* Dissenting Op. at 168 n.8 ("When a school board decides to remove a book from the school libraries within its district, it indeed has banned itself from having that book on its library shelves."). The dissent does not explain how removing a book from one's own library shelves is any more banning it than deciding not to shelve the book to begin with would be. Taken to its logical end, the dissent's view is that everyone who does not purchase a book to begin with has banned himself or herself from having the book. As the dissent sees things, there is a whole lot of banning going on.

There is, after all, a difference between banning and "removing." The word "remove" means "to move from a place or position; take away or off." *Random House Unabridged Dictionary* 1630 (2d ed. 1993); *see also Black's Law Dictionary* 1322 (8th ed. 2004) (defining removal as "[t]he transfer or moving of a . . . thing from one location, position, or residence to another"). That is what the Board did with the book; it did not forbid or prohibit anyone from publishing, selling, distributing, or possessing the book. Nor is it accurate to say, as the dissent does, that the Board "prohibited even the voluntary consideration of the book in schools." Dissenting Op. at 168. There is not one whit of evidence in the record to suggest that the Board prohibited anyone from considering the book anytime or anywhere. Any student or teacher was free to consider the book. The Board simply decided to

remove the book from the library shelves of the schools in its district.

The dissenting opinion argues that "our own Circuit's usage of the word" ban can be found in *Virgil v. School Board of Columbia County*, 862 F.2d 1517, 1525 (11th Cir. 1989), *and Searcey v. Harris*, 888 F.2d 1314, 1318, 1322 (11th Cir. 1989). *See* Dissenting Op. at 169. The part of the *Virgil* opinion the dissent relies on is not the basis of the decision, and it cites—"cf."— only to the opinion of a district court in Maine. *See Virgil*, 862 F.2d at 1525. The *Virgil* decision, which upheld a school board's removal of some literary texts from the school curriculum, did not establish anything about the definition of banning. Nothing in *Virgil* suggests that a school board's decision to remove books from its library shelves necessarily constitutes "banning."[14] *See id.*

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[14] In assessing whether the school board's decision to remove certain books from the school curriculum was reasonably related to its legitimate motive for doing so, we reasoned in *Virgil* that the books were still accessible: "No student or teacher is prohibited from assigning or reading these works or discussing the themes contained therein in class or on school property. *Cf. Sheck v. Baileyville School Committee*, 530 F. Supp. 679 (D. Maine 1982) (granting preliminary injunction against school banning of book from library for its 'objectionable' language, where ban extended to mere possession of work anywhere on school property, including school buses)." *Virgil*, 862 F.2d at 1525. In *Virgil* we did not engage in a "consistent use of the word" ban, Dissenting Op. at 169 n.10, to define a school board's decision to remove books from its school libraries. In the present case, as in *Virgil*, the Board did not prohibit students or teachers from assigning or reading *Vamos a Cuba* or discussing the themes contained therein in class or on school property. *See Virgil*, 862 F.2d at 1525. It did not forbid the possession of *Vamos a Cuba* anywhere on school property. *See id.* It did not, under *Virgil*, ban the

As for the *Searcey* case, neither its facts nor its use of the word "ban" had anything to do with a book's removal from a school's library shelves or removal of a book from anywhere. Nor are we persuaded by the fact that other courts in other jurisdictions may have from time to time used the word loosely or incorrectly. *See* Dissenting Op. at 170-71.

If the matter is to be resolved by looking at how the actions that the Board took in this case have been described by other courts in other opinions, we would think that the best place to look is in the Supreme Court decision from which we are drawing our legal standard. We are assuming that the *Pico* plurality's legal standard applies. *See supra* at 56. In that case, as in this one, a school board ordered that some books be taken off the library shelves of the schools in its district. If that action amounted to banning those books, one would think that at least one of the seven separate opinions that the Supreme Court issued in the *Pico* case would have said so. None did.

Instead, the one thing that every one of the justices agreed on in *Pico* is that a school board's action in removing a book from school library shelves is more accurately described as removing the book instead of as banning it. In describing what the board did the *Pico* plurality opinion used "removal" or a derivative of that word forty-eight times. 457 U.S. at 856-75, 102 S. Ct. at 2802-12.

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book.

It did not use the word "ban" or any derivative of it once. *See id.*, 102 S. Ct. at 2802-12. Justice Blackmun's partial concurrence in the plurality opinion and concurrence in the judgment used some form of the word "removal" six times to describe the board's action. *Id.* at 877-82, 102 S. Ct. at 2813-16. It did not use any form of the word "ban," not even once. *See id.*, 102 S. Ct. at 2813-16. Justice White's opinion, which concurred in the judgment, four times described what the board did as removing the book. *Id.* at 883, 102 S. Ct. at 2816. It did not once describe the action as banning the book. *See id.*, 102 S. Ct. at 2816. Chief Justice Burger's dissenting opinion, joined by Justices Powell, Rehnquist, and O'Connor, seventeen times described the board's action as removing books. *Id.* at 889-93, 102 S. Ct. at 2820-21. It never described what the board did as banning books. *See id.*, 102 S. Ct. at 2820-21. Justice Powell's dissenting opinion referred to removing books three times. *Id.* at 894-97, 102 S. Ct. at 2822-23. It never referred to banning books. *See id.*, 102 S. Ct. at 2822-23. Justice Rehnquist's dissenting opinion, joined by Chief Justice Burger and Justice Powell, on twenty-eight occasions described what the board did as removing books. *Id.* at 906-19, 102 S. Ct. at2828-34. It never described what had happened as banning books. *See id.*, 102 S. Ct. at 2828-34. Justice O'Connor's five-sentence dissenting opinion used the word "remove" once. *Id.* at 921, 102 S. Ct. at 2835. It did not use the word "ban." *See id.* at 921, 102 S. Ct. at 2835. One hundred and seven times the *Pico* Court's various opinions described the action of

the school board in taking books off library shelves. *See generally id.* at 855-921, 102 S. Ct. at 2802-35. Every one of those hundred and seven times the Supreme Court called the board's action what it was—removing the books. *See generally id.*, 102 S. Ct. at 2802-35. Never once did any member of the *Pico* Court take the position, which our dissenting colleague does, that a school board's action in taking a book off library shelves amounts to banning the book. *See generally id.*, 102 S. Ct. at 2802-35.

The dissenting opinion argues that if a school board's action in removing a book from its own library shelves does not amount to banning a book, then a school board can never ban a book. *See* Dissenting Op. at 172. So what? Nowhere is it written that a school board must be empowered to ban books. Because a school board has no power to prohibit people from publishing, selling, distributing, or possessing a book, it has no power to ban books. That definition of banning does not "limit[] the word's application to almost nothing," as the dissent insists. Dissenting Op. at 172. The Board removed books based on its "significant discretion to determine the content of [its] school libraries." *See Pico*, 457 U.S. at 870, 102 S. Ct. at 2810 (plurality opinion). Describing the Board's actions as "banning" runs counter to the Supreme Court's terminology in *Pico* and muddies the water in the motive analysis.

F.

The School Board's educational suitability criteria for books in the school library include the

requirement that "[n]onfiction information is correct, recent, and objective." [R:19:125:No.3] As we have just explained, it is undisputed that some of the information contained in *Vamos a Cuba* is not correct, recent, and objective. The School Board majority has consistently stated that the reason it was removing the book from school library shelves was its inaccuracies. Despite all of this, the district court still concluded that the School Board's stated reason was a guise for its members' actual motive to suppress *Vamos a Cuba*'s viewpoint and "impose upon their students a political orthodoxy to which they and their constituents adhered." *ACLU*, 439 F. Supp. 2d at 1272. It was, the district court believed, an act of viewpoint discrimination intended "to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed." *Id.* at 1283.

The district court's reasoning is flawed. It never comes to grips with the substance of the School Board's position, which is that representations made in *Vamos a Cuba* falsely portray a life in Cuba that does not exist and that in reality life under the Castro regime is bad—really bad. At some points the court's opinion seems to acknowledge the truth about life in Cuba. *See id.* at 1284 ("Tragically, [the Board's] point-of-view is based on real life experiences that members of the Cuban Community and their families have painfully endured in Cuba before coming to this country, and which many who have remained continue to endure under an oppressive totalitarian regime."); *see also id.* at 1265-66 ("The

heart of the argument is that the Cuba Books omit the harsh truth about totalitarian life in Communist Cuba."). Yet, at other points the district court's opinion seems to deny the undeniable. *Id.* at 1283 (referring to the claim of "'inaccuracies '"and "'omission'" with quotation marks around those words); *id.* (referring to the Board members' "point-of-view of what is 'true' for a child's life" with quotation marks around the word "true"); *id.* (stating that "the real issue was that the Cuba Books . . . did not reflect, *as viewed by the majority of the School Board members*, the true evil of Castro's government and the oppression of the Cuban people" (emphasis added)); *id.* at 1284 (referring to the "perceived inaccuracies").

In places the district court opinion parodies the School Board's position, insisting that "[t]he gist of the argument, however, is that the books were too objective and, therefore, should be banned." *Id.* at 1283. The gist of the Board's argument is actually just the opposite. The Board's consistent position has been and remains that *Vamos a Cuba* is not objectively accurate but instead is factually inaccurate and that because of glaring omissions and incorrect information, the book misrepresents life in Cuba. The Board is right about that.

The district court's reasoning also misapprehends the importance of factual accuracy in this type of First Amendment analysis. After quoting one Board member's statements about how *Vamos a Cuba* distorts the truth because people in Cuba are deprived of freedom and life is not the same in Cuba as in this country, the court stated that

"[t]he merit or truth of these statements is not the issue." *Id.* at 1284. To the contrary, they are very much the issue. Whatever else it does in the context of school library books, the First Amendment does not require a school board to leave on its library shelves a purportedly nonfiction book that contains false statements of fact.[15] That is no less true if, as here, the falsehoods in the book make a totalitarian regime that is out of favor in this country look better than the true facts would. A preference in favor of factual accuracy is not unconstitutional viewpoint discrimination.

Nor is the omission of factual information about the hardships of life in another country a political viewpoint entitled to protection. One of our differences with the dissenting opinion can be seen in its discussion of Board member Bolanos' explanation about why he was voting to remove *Vamos a Cuba* from the school library shelves. *See* Dissenting Op. at 137-40. Mr. Bolanos talked about the factual distortions in the book and its failure to mention food

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[15] The dissenting opinion seems almost, but not quite, willing to acknowledge as much. In one place it concedes, "A school board may remove a book from a school library for legitimate pedagogical reasons, such as obscenity or factual inaccuracy." Dissenting Op. at 133; *see also id.* at 126 n.3 ("Plainly, school boards may remove books from library shelves which contain falsehoods."). At other places, however, the dissenting opinion seems to indicate that the Board may act only if the inaccuracies are "gross" ones. *See id.* at 125-26 ("I also agree that the First Amendment does not forbid a school board from removing from its shelves books that contain gross factual inaccuracies."). We do not think that the Constitution obligates a government entity to place falsehoods, whether gross or ungross, on the shelves of school libraries.

rationing, religious persecution, prosecution of those who speak out against the government, deprivation of due process, and so forth. *Id.* at 137-39. The dissent characterizes his statements about the book's factual inaccuracy and omissions as amounting to opposition based on the book's omission of "negative political information" and says that they show Bolanos wanted to require the "book to carry a political viewpoint." *Id.* at 139. We disagree. Facts about the conditions inside a country are not a viewpoint. They are facts. A book that recounts those facts accurately would not, for that reason, be political in nature. And a book that presents a distorted picture of life inside a country—whether through errors of commission or omission—does not, for that reason, become "apolitical."

Those who express minority viewpoints are no more entitled to fill a school library shelf with factually inaccurate statements than anyone else. A few examples illustrate the point. The series of books that gave rise to this case does not include one about North Korea, but suppose it did. Suppose that book stated: "People in North Korea eat, work, and go to school like you do." We probably could all agree that statement is factually inaccurate. Would a school board be prohibited from removing the book on the ground that doing so would constitute viewpoint discrimination? Or because it promotes political orthodoxy to remove a book that makes a despised regime look better than the truth would? Would a school board's decision to remove that book from the shelves of its libraries

amount to book banning? Would removing it be unconstitutional?

As the School Board pointed out in its hypothetical examples, what about a book that talked about the life of German children during the Third Reich? [Board Br. 11] Suppose the book, in addition to describing some of the geography of Germany, said: "People in the Third Reich ate, worked, and went to school like you do," being careful not to mention any of the millions of people who were sent off to concentration camps. And that this book, like the *Vamos a Cuba* book, had a cover showing youths in uniform.[16] Hitler is out of favor now. Political orthodoxy views his regime as evil. Would that book's distortion through omission be protected on the ground that it was "apolitical"? Would the Constitution forbid a school board from removing that book from its library shelves because it was "a book that failed to reflect politically orthodox views toward [the Third Reich]"? *See* Dissenting Op. at 147. Would the fact that a board removed the book because it did not contain enough information about life in the Third Reich—omitting what the dissent might call "negative political information"—be considered forbidden viewpoint discrimination? Would the

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[16] The dissenting opinion points out that the cover of *Vamos a Cuba* contains a picture of Cuban school children in uniforms and states that one of the Board members found that "was offensive because of the Cuban school uniform's symbolic connection with that which he abhors." Dissenting Op. at 142-43. The Hitler Youth wore uniforms, too, and that uniform was symbolically connected to that which many people abhor about the Third Reich.

opposition to the book's inaccuracy be disregarded if one segment of the population was particularly upset about the book's distortions because of "their intolerance to messages that fail to conform to their personal experiences"? *See id.* at 143. Would the school board's actions be forbidden because "a sensitivity to the horrors of the [Hitler] regime does not permit state-sponsored censorship of other viewpoints"? *See id.* at 145. Would it be enough to say, as the dissent does, that: "The answer to books that do not provide all the information a reader wants is to find another book. If a reader is curious about the [Hitler] regime, he can find another book that enlightens him further"? *Id.* at 162. Would removing the book be prohibited because including "the negative information about [the Third Reich that] the School Board claimed was omitted could render the book developmentally inappropriate for children"? *See id.* at 159. Would the First Amendment require that the book be left on the shelves of the school district library?[17]

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[17] The dissenting opinion at least implies that the Constitution would forbid a school board from removing from its library shelves a book that misrepresented life in the Third Reich. *See* Dissenting Op. at 143 n.4. The hypothetical is not about a book that merely shows a picture of Hitler Youth in uniform but instead describes a book that falsely represents to school children that people in the Third Reich "ate, worked, and went to school like you do," without mentioning the bad aspects of life under that regime. To the extent the dissent views a board's removal of such a book from its own library shelves as "censor[ing] a book" and as unconstitutionally "prescribing political orthodoxy," that position illustrates our disagreement with the dissent. *See id.*

And what about a book about life in the antebellum South that asserted: "People in the old South ate, worked, and went to school like you do," neglecting to mention anything about slavery and the millions of human beings who lived and died in bondage? [Board Br. 11] Would we describe that book as "apolitical"? Would a school board be forbidden from removing the book from its library shelves because the book's distortions were through omissions, or because it went against "politically orthodox views"? Would removal of the book be prohibited on the ground that it was motivated by the book's failure to contain enough "negative political information" about the pre-Civil War South? If the book depicted some children not wearing shirts or shoes in the summertime, would that insulate it from removal on the ground that anything else would be "[m]ore extreme negative information"? *See* Dissenting Op. at 160. Would the glaring falsehoods through omissions in the book be protected by the First Amendment on the ground that they further the revisionist views of some who pine for old Dixie? Would a federal court order require that a school board keep that book on its library shelves?

The district court's opinion insists that *Vamos a Cuba*, including its statement that "People in Cuba eat, work, and go to school like you do," is "content-neutral and scrupulously apolitical." *ACLU*, 439 F. Supp. 2d at 1283. We disagree. By misrepresenting life in Cuba, the "like you do" statement makes the totalitarian regime that runs the country and controls the lives of

everyone in it appear much better than telling the truth would. Statements in what purports to be a nonfiction book that whitewash the problems of a country and make the life of its people appear to be better than it is are not content neutral any more than overt propaganda would be. Misstatements of fact that benefit, directly or indirectly, the ruling government in a country are inescapably political in nature and effect. The "like you do" statement in a book about Cuba is no more content neutral or apolitical than the same statement would be in a book about North Korea, or in one about the Third Reich, or in one about the antebellum South.

There is something of this flavor in the plaintiffs' argument and the district court's opinion: the majority of the School Board members were Cuban Americans; Cuban Americans despise Castro and his regime; therefore, the Board's removal of the book must have been motivated by their disagreement with the book's political viewpoint instead of by its factual inaccuracies. *See id.* (considering whether "School Board members who happen to emigrate from any of these [other] countries [in the "A Visit to" series] to the United States [should] be permitted to ban books in the Series because of their individual political orthodoxy and point-of-view of what is 'true' for a child's life in one or more of these countries"); *id.* at 1284 (referring to the "real life experiences that members of the Cuban Community and their families have painfully endured in Cuba"). To the extent that is an

argument, it confuses interest with motive. Cuban Americans are more interested than others in removing a book that falsely portrays, to the upside, life in Castro's Cuba, but that does not mean their motive for wanting the book removed is anything other than the fact that the book contains falsehoods. If the book accurately discussed life in Cuba, they would have no reason to have it removed.

Besides, the argument in question sweeps too widely. It would, for example, render constitutionally suspect the votes of Jewish school board members to remove our hypothetical book about life in the Third Reich. It would do the same to the votes of any African American board members who wanted to remove our hypothetical book about life in the antebellum South. Interest does not necessarily equate with improper motive. If some members of the Board found *Vamos a Cuba* to be offensive, the record establishes that what offended them was its inaccurate portrayal of life in Cuba.

Unlike the dissenting opinion, we do not agree with the district court that the factual inaccuracies in the book were "altogether separate from any determination about quality of life in Cuba." Dissenting Op. at 134. The factual inaccuracies about the quality of life in Cuba go to the heart of the dispute. If Vamos a Cuba had not distorted the facts about life in Cuba—by insisting, for example, that "People in Cuba eat, work, and go to school like you do"—there would not have been any opposition to the book. There would have been no difference in view. If the book had

told the truth about life in Cuba or had simply refrained from presenting a distorted picture of it, there would have been no opposition. The book did not tell the truth. It made life in Cuba under Castro appear more favorable than every expert who testified for either side at the hearing knows it to be, more favorable than the State Department knows it to be, more favorable than the district court knows it to be, *see ACLU*, 439 F. Supp. 2d at 1265-66, 1284, and more favorable than we know it to be. Once you find, as we have, that the book presents a false picture of life in Cuba, one that misleadingly fails to mention the deprivations and hardships the people there endure, the argument that the Board acted for ideological reasons collapses on itself. The asserted motive of the Board, which is to paint Castro's regime in its naturally bad light, does not exist apart from the factual inaccuracy of the book.

G.

The plaintiffs and their experts convinced the district court that the factual errors in Vamos a Cuba could not be corrected without producing a book that was educationally unsuitable for four to eight year old children.[18] This position overlooks the fact that simply omitting the most obvious falsehood—the statement that "People in Cuba eat, work, and go to school like you do"—could not possibly render the book unsuitable for the target

[18] The record reveals some discrepancies regarding the age range of the target audience for *Vamos a Cuba*. *See* note 2, *supra*. The district court concluded that four to eight was the target age group, and we accept that. *ACLU*, 439 F. Supp. 2d at 1248.

age group or any other. As a matter of fact, that very statement was omitted from the books about the countries where life is most similar to life here—England, Scotland, Wales, and Canada. No one could reasonably suggest that the omission of the "like you" statement from those books rendered them educationally unsuitable.[19]

The district court's decision about educational suitability is also wrong for the more fundamental reason that it was not a matter for the district court to decide. Federal courts should not arrogate to themselves power over educational suitability questions. Such questions are the perfect example of a core educational policy matter within the exclusive province of local school boards. Yet the district court proceeded to hear evidence on the suitability issue, and after considering conflicting expert opinion, pronounced: "I conclude that the greater weight of the more credible evidence, for preliminary injunction purposes, supports the educational suitability of the books" as they are. *Id.* at 1286. The court even decided that correcting the inaccuracies in *Vamos a Cuba* would do more harm than good, because "too much information of the kind at issue is cognitively more damaging to young children than too little." *Id.* at 1287 (footnote omitted).

In examining and deciding whether *Vamos*

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[19] The reason the series omits the "like you" statement from the very books where it would be accurate is a mystery. The theory behind this paradox may be that the educational suitability of asserting that life in another country is like life in this country varies inversely with the truth of the statement. We hope not.

a Cuba was educationally suitable, or would be made more or less suitable for school children if it more accurately described the conditions in Cuba, the district court stepped well beyond the proper bounds of the judiciary. The Supreme Court has repeatedly instructed us:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968); *see also Tinker*, 393 U.S. at 507, 89 S. Ct. at 737 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

A Seventh Circuit decision in this area is instructive. See *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980). In *Zykan* the school board made some decisions about the English curriculum at a high school, the use of books in that curriculum, and the rehiring of English teachers. *Id.* at 1302. The plaintiffs alleged, among other things, that the removal of certain books from some courses and from the school library violated their rights under the First and the Fourteenth Amendments. *Id.*

The Seventh Circuit observed that state legislatures have "lodge[d] primary responsibility for secondary school education in local school boards." *Id.* at 1305. The court also recognized that "[v]irtually every judicial body that has commented on the matter [of school board authority] has acknowledged the need for broad discretionary powers in local school boards." *Id.* (citing cases). Although *Zykan* was decided before *Pico*, its conclusions regarding the authority of school boards to make choices about educational suitability remain undisturbed by the *Pico* plurality rule, which we are assuming applies for purposes of deciding this case. As the court explained in *Zykan*, "nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute." *See Zykan*, 631 F.2d at 1306.

The extent to which the dissenting opinion second guesses the Board on its educational suitability decision is evident from the acknowledgment that "[i]t could well be that *Vamos a Cuba*'s simple depiction of life in Cuba does not contain information that would lead to a child's better understanding of it." Dissenting Op. at 158. Yet instead of leaving that decision to the Board, the dissenting opinion decides it, choosing the view of the plaintiffs' experts over that of the Board and its experts on the suitability question. *See id.*

The dissenting opinion also concludes that including all of the negative information about Cuba "could render the book developmentally inappropriate for children." Dissenting Op. at 159. Neither the dissent nor any of plaintiffs' experts have explained why, if that is true, inclusion of negative information about other countries is developmentally appropriate for children. For example, as we have pointed out, the "A Visit to" book about India informs the same audience of young readers that: "Many children are too poor to go to school. Their families need them to stay at home. The children help farm or they beg in the streets." [R:28: A Visit to India at 23] And the book about Cambodia tells this same audience that some children in that country cannot go to school because after 20 years of war many schools have been destroyed. [*Id.* A Visit to Cambodia at 23] If it is developmentally appropriate to tell children in this country about some of the hardships that children face in India and in Cambodia, it is no less developmentally appropriate to mention some of those that children face in Cuba. Or at least the Board reasonably could decide that, and it is the Board that should be allowed to make that decision.

The dissent's argument that young children should not be told about "domestic violence, underage prostitution, sex tourism, [and] discrimination against persons of African descent," Dissenting Op. at 159 (quotation marks omitted), is a red herring. No one has suggested that all of the problems the people of Cuba face should be specifically discussed. But if an audience of this

age can be told about children in India begging in the streets and children in Cambodia not being able to go to school because of the effects of decades of war, there is no reason that they cannot be told about food shortages, rationing, discrimination, or similar problems in Cuba. There is a difference between not including graphic detail about adult subjects on the one hand and falsely representing that everything is hunky dory on the other.

The dissenting opinion insists that federal courts may substitute their own findings and opinions about educational suitability for those of a school board whenever the board's motive for an action is questioned. *See* Dissenting Op. at 154. That approach would eviscerate the precedent that cautions against second-guessing educational suitability decisions of local school boards, because it would allow federal courts to make these decisions whenever a litigant questions the motive behind a board decision. And motive can always be questioned in these kind of cases. The result of the dissent's position would be that federal courts instead of school boards would always end up making the final educational suitability decision. We are neither qualified nor constitutionally authorized to do that.

In this case the real issue for the federal courts, under the assumption of law that we have made, is not the educational suitability of *Vamos a Cuba*. It is whether the Board's decision to remove the book from school library shelves was motivated by its inaccuracies concerning life in Cuba

or by a desire to promote political orthodoxy and by opposition to the viewpoint of the book. We find from the evidence in this record, including the School Board majority's consistent statements that it was removing *Vamos a Cuba* from the school library shelves because of factual inaccuracies and the undisputed fact that the book does contain inaccuracies, that those inaccuracies were what motivated the Board. If there had been no factual inaccuracies, the book would not have been removed. While the fact that the Board members who voted to take the action are Cuban American may explain their interest in it, that does not impugn their motive. The stated motive was not a pretext or a guise for viewpoint discrimination. The plaintiffs' First Amendment claim does not have a substantial likelihood of success on the merits. The district court should not have granted a preliminary injunction based on that claim.[20]

V.

The district court also concluded that the plaintiffs had a substantial likelihood of success

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[20] In its conclusion the dissenting opinion endorses the view of one person who attended the Board meeting to oppose removing *Vamos a Cuba*. *See* Dissenting Op. at 174. The opinion quotes with approval his statement that if a school board can remove from its own library shelves a book (containing falsehoods), then "'we may have become what we protest against—a totalitarian government.'" *Id.* We do not agree with the dissent about that. Allowing a school board to remove from its library shelves a book that contains falsehoods does not mean that we have a totalitarian government like Cuba does. The statement that we do ranks right alongside the statement in *Vamos a Cuba* that "[p]eople in Cuba eat, work, and go to school" like people in this country do.

on their due process claim and rested the preliminary injunction on that ground. *ACLU*, 439 F. Supp. 2d at 1288-89. The due process claim is dependent on both of two propositions. One is that the Board violated its own regulations by removing copies of *Vamos a Cuba* from libraries other than the one from which the original complaint came, and the other is that every violation of a regulation amounts to a violation of due process. *Id.* Neither proposition survives scrutiny.

A.

The School Board's regulations do not prevent the Board, once it decides that a book is unsuitable, from removing that book from every library in the school district. The regulations specify the procedure a parent must use if he wants to have a book removed from the shelves where his child attends school. *See supra* at 5-7. The regulations provide that if the parent is not successful through the District Committee he "may appeal the decision of the Superintendent to the School Board in writing and may request an appearance before the Board in accordance with School Board Rule 6Gx13-8C-1.17." [R:19:41:6A-1.26(VIII)(C)(3)(h)] The regulations are, however, silent about the actions the Board may take if it agrees with a parent that a book in the school district's libraries is educationally unsuitable. The Board has interpreted that silence to mean that it can take any reasonable action, including removing the book from every school district library where a copy of it can be found. *ACLU*, 439 F. Supp. 2d at 1290.

We have said that deference is owed to a municipal body's statutory interpretation of its own rules and regulations "'so long as its interpretation is based on a permissible construction.'" *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1232 (11th Cir. 2006) (quoting *Southlake Property Assocs. v. City of Morrow, Ga.*, 112 F.3d 1114, 1119 (11th Cir. 1997)). The Board's interpretation of its own regulation is not only based on a permissible construction, it may well be the only reasonable interpretation of that regulation.

The alternative reading of the regulation, which the plaintiffs proposed and the district court accepted, would lead to an absurd result. After a long and deliberative process had led the Board to conclude that a book was educationally unsuitable, it would be forced to leave the book in every library in the district except the one where the complaint originated. Then, supposedly, the entire process would have to start over when another parent whose child attended a different school complained about the same book. The process could be repeated for every one of the district libraries where the book could be found—thirty-three in the case of *Vamos a Cuba*. On and on it would have to go until the process, as well as the committees and the Board, were exhausted. To dismiss that prospect as "somewhat burdensome," as the district court did, *ACLU*, 439 F. Supp. 2d at 1291, is like dismissing the Ironman triathlon as somewhat tiring.

The plaintiffs argue, and the district court pointed out, that the School Board's own attorney

concluded in her advice to the Board that "there is no provision in the school Board Rule for a district-wide removal of a school library book stemming from a [District Committee] review." *Id.* at 1290. [ACLU Br. 52-53] That is true. There is no provision one way or the other. The regulation neither explicitly permits nor explicitly forbids the Board from entering a district-wide removal order. Its silence is symmetrical.

The School Board's attorney also advised it that "the Rule does not prohibit the Board from making a decision affecting the District as a whole," but that a district-wide decision "would be more susceptible to legal challenge." [R:19:113 n.6] That may be true, but susceptibility to legal challenge does not equate with legal invalidity. In any event, the Board's attorney also expressed the opinion that the regulation offers the School Board "wide latitude in reaching a decision as to the merits of the appeal and in crafting a resolution." [*Id.* at 113] This is exactly the interpretation of the regulation that the School Board advocated before the district court and here, an interpretation to which we owe deference.

Even if there were a difference of opinion between the Board and its attorney as to the proper interpretation of the regulation, the Board is the arbiter of the meaning of its regulations. The Board, and not its attorneys, decides for the Board and for the schools within the district. *See* Fla. Stat. § 1001.33 ("[A]ll public schools conducted within the district shall be under the direction and control of the district school board

with the district superintendent as executive officer."). The Board is not bound to follow its attorney's advice.

We defer to the School Board's reasonable interpretation of its own regulation. *See Beaulieu*, 454 F.3d at 1232; *Southlake Property Assocs.*, 112 F.3d at 1119. Under that interpretation the Board was authorized to order, as it did, the removal of all copies of *Vamos a Cuba* from school library shelves throughout the district. There was no violation of the regulation. That conclusion is fatal to the plaintiffs' procedural due process claim.

B.

Even if the Board had violated its own regulation, it would not follow that it had violated due process. The district court's belief that "an agency must follow its own rules in order to avoid infringing due process rights," *ACLU*, 439 F. Supp. 2d at 1292 n.45, cannot be grounded in the law of this circuit. Under that belief, every procedural regulation an agency adopts effectively amends the Constitution so that violating the regulation violates the Constitution. That is not the law.

In *Smith v. Georgia*, 684 F.2d 729 (11th Cir. 1982), the plaintiff made essentially the same argument that the plaintiffs make in this case. *Id.* at 732 n.6. He argued that "the state agency's failure to follow its own regulations, without more, offends due process." *Id.* We rejected the argument, explaining that "[w]hile it is possible that disregard

for state procedures may support a constitutional claim, the two analyses are separate, and even if [the state agency] departed from its own guidelines, not every violation by a state agency of its own rules rises to the level of a due process infringement." *Id.* (citations omitted). Instead, "the root requirement of the Due Process Clause" is that one be given notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985) (quotation marks omitted). There was plenty of notice and opportunity to be heard in this case.

Juan Amador filed his complaint about *Vamos a Cuba* on April 6, 2006. The School Board announced on or before April 18, 2006 that it would take up the matter at its meeting on that date. [R:19:Ex.19] At that April 18 meeting, two representatives of the ACLU, of which plaintiff Mark Balzli is a member, appeared and spoke in favor of retaining the *Vamos a Cuba* books in the school district's libraries. [R:19:328-32] Twenty-two other members of the community also spoke on one side of the issue or the other. [*Id.* at 304-51] The student government president, whose organization is a would-be plaintiff in this case, did not attend the April 18 meeting, but one of the Board members read a statement from him opposing removal of the book. [*Id.* at 373-74] After hearing from all those who wanted to speak the Board rejected the proposal to remove *Vamos a Cuba* at that time, and instead opted to wait for the committees that were considering the book to

complete their review of it.

On June 7, 2006 the School Board again announced that it would discuss the removal of *Vamos a Cuba* from the district's libraries, this time at its June 14, 2006 meeting. [R:19:Ex.22] The ACLU sent a letter to the Board, which again registered its objections to removing *Vamos a Cuba*, "request[ed] that the Board follow the First Amendment," and "suggested that the Board purchase more books on Cuba, with different perspectives, rather than give license to censorship." [R:39:11] A student government representative attended the June 14 meeting and spoke against removing *Vamos a Cuba* from the school district's libraries (although she did acknowledge that "this book has inaccuracies, and it has omissions"). [R:19:392, 416-19]

The root requirements of due process were amply met. The plaintiffs had notice and an opportunity to be heard. They were heard. To the extent that the School Board did not adhere to its regulations—and we think that it did—the plaintiffs still were not deprived of their due process rights.

VI.

In conclusion, the plaintiffs do not have standing to pursue injunctive relief as to removal of any of the "A Visit to" series of books other than the *Vamos a Cuba* (in both languages) book. The part of the complaint concerning removal of the other books is due to be dismissed for lack of standing. As to the removal of the *Vamos a Cuba* book the plaintiffs do have standing. Even assuming that the

First Amendment applies to school board decisions to remove books from school libraries, the Board's action in removing this book did not violate the First Amendment. Nor did the Board's actions with respect to the book violate the procedural due process rights of the plaintiffs.

The preliminary injunction is VACATED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

WILSON, Circuit Judge, dissenting:

The First Amendment prevents the government from banning books from school libraries, except in limited circumstances not present here. I find no abuse of discretion by the district court, which determined that there is a substantial likelihood that *Vamos a Cuba* was banned from the Miami-Dade County school library shelves because of its viewpoint, rather than for legitimate pedagogical reasons. Therefore, I must respectfully dissent.

I. STANDING

I agree with the majority's reasoning and conclusion that while the plaintiffs do not have standing to challenge the School Board's order to remove the entire *A Visit to* series, they do have standing to challenge the order to remove copies of *Vamos a Cuba*.[1] I thus turn to the issues regarding that part of the preliminary injunction.

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[1] I refer to all copies of the English *A Visit to Cuba* and its Spanish-language counterpart, *Vamos a Cuba*, by the title *Vamos a Cuba*, as the majority does.

II. PRELIMINARY INJUNCTION

"A district court may grant preliminary injunctive relief if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). The School Board argues that we should reverse the district court's grant of a preliminary injunction because the plaintiffs failed to establish a substantial likelihood of success on the merits.

The majority demands more than the law requires in its review of the district court's grant of a preliminary injunction. First, "[w]e review the ultimate decision of whether to grant a preliminary injunction [only] for abuse of discretion. . . ." *Owner-Operator Ind. Driver's Ass'n, Inc. v. Landstar Sys., Inc.*, 541 F.3d 1278, 1293 (11th Cir. 2008) (quoting *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996)). "The trial court has considerable discretion in determining whether the situation requires the issuance of . . . a [preliminary] injunction and the fact that the appellate court reaches a contrary conclusiondoes not warrant a reversal." 11A CHARLES ALAN WRIGHT, ARTHUR R.MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §2962 (West 2008). Our review is highly deferential to the district court. *Siegel*, 234 F.3d at 1178; *BellSouth Telecomms., Inc. v. MCImetro Access*

Transmission Servs., LLC, 425 F.3d 964, 968 (11th Cir. 2005) ("We begin our review by noting how deferential it is."). "The review of a district court's decision to grant or deny a preliminary injunction is extremely narrow in scope." *Carillon Imps. v. Frank Pesce Int'l Group,* 112 F.3d 1125, 1126 (11th Cir. 1997). *See also Revette v. Int'l Ass'n of Bridge,* 740 F.2d 892, 893 (11th Cir. 1984) ("Appellate review of such a decision is very narrow."). "This Court will not review the intrinsic merits of the case." *Id.* (quoting *United States v. Lambert,* 695 F.2d 536, 539 (11th Cir. 1983) (internal quotation marks omitted)).

> This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district court.

Siegel, 234 F.3d at 1178 (quoting *Gray Line Motor Tours, Inc. v. City of New Orleans,* 498 F.2d 293, 296 (5th Cir. 1974)).

> The expedited nature of preliminary injunction proceedings often creates not only limits on the evidence available but also pressure to make difficult

> judgments without the luxury of abundant time for reflection. Those judgments, about the viability of a plaintiff's claims and the balancing of equities and the public interest, are the district court's to make and we will not set them aside unless the district court has abused its discretion in making them.

BellSouth, 425 F.3d at 968 (quoting *Cumulus Media Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002)). "[T]he trial judge's ability to formulate a decree tailored to deal with the violations existent in each case is normally superior to that of any reviewing court, due to his familiarity with the testimony and exhibits." *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1547 (11th Cir. 1986). "The abuse-of-discretion standard, therefore, serves an important and vital purpose." *Siegel*, 234 F.3d at 1178.

An abuse of discretion occurs if a district court fails to apply the proper legal standard or to follow proper procedures in making the determination, or makes findings of fact that are clearly erroneous. We review "findings of fact . . . for clear error," *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999). We review "constitutional facts" *de novo*. Here, the School Board's motive in removing *Vamos a Cuba* is a constitutional fact. *See United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002); [Majority Opinion at 52-62]. Thus, I review the district court's finding of the School Board's

motive in making the removal decision *de novo*, but we must show higher deference to the district court's other findings of fact. The majority claims it reviews only the School Board's motive *de novo*, but it in fact includes many other fact findings that require greater deference in its *de novo* review.

While the majority is entitled to review the district court's finding of the School Board's motive as if the district court had made no such finding, that cannot be said for other facts the district court found with which the majority disagrees. For example, the district court found that many of the proffered inaccuracies were of little consequence and that many of the omissions were appropriate to omit given the age level and purpose of the book. *ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 439 F. Supp. 2d 1242, 1288 n.42 (S.D. Fla. 2006) [hereinafter *ACLU*]. The majority disagrees, finding that the book "contains substantial factual errors" and that the presentation of that information is "damaging" to its readers. [Majority Opinion at 80-81.] While the majority may disagree with the district court about what testimony and evidence was more credible and persuasive, this is not the majority's place. "[D]ue to his familiarity with the testimony and exhibits," the trial judge was in a superior position to make determinations about the seriousness of the inaccuracies and omissions. *See AmBrit*, 812 F.2d at 1547. While the majority may find "the 'like you' representation [to be] inaccurate," [Majority Opinion at 85], the district court found that it was not an inaccurate factual statement, but was

merely a device to emphasize the things that we have in common with Cuban people. *ACLU,* 439 F. Supp. 2d at 1288. The district court was well within its discretion to rely on what it deemed to be the greater weight of the more persuasive and credible evidence presented at the preliminary injunction hearing. The majority disagrees with the district court's findings that the book is "content-neutral and scrupulously apolitical." *Id.* at 1283. It instead opines that "the 'like you do' statement makes the totalitarian regime that runs the country and controls the lives of everyone in it appear much better than telling the truth would." [Majority Opinion at 101.] It was not clearly erroneous for the district court to rely on the scores of professional educators that agreed that the book was "content-neutral and scrupulously apolitical." The majority oversteps the applicable standard of review and engages in *de novo* review with regard to many factual findings.

Second, the majority treats this case as if it were a decision on the merits. It is not. This is an appeal from a preliminary injunction, for which there need only be a substantial *likelihood* of success on the merits, not a substantial *certainty* of success, as the majority seems to require. "The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, . . . may grant a stay even though its own approach may be contrary to movant's view of the merits." *Ruiz v. Estelle,* 650 F.2d 555, 565 (5th Cir. 1981)[2] (quoting *Wash. Metro. Area Transit*

[2] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.

Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). In other words, "[a] district court's determination that such a showing has been made is best understood as a prediction of a probable, but necessarily uncertain, outcome." *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002). *See also Am. Fed'n of Gov't Employees, Local 1858 v. Callaway*, 39 8 F. Supp. 176, 196 (N.D. Ala. 1975) ("Th[e] [likelihood of success on the merits] requirement does not mean that a plaintiff must establish during a preliminary hearing held only a few days after the institution of suit, without the benefit of discovery, that no doubt exists as to the ultimate resolution of the merits."). "All courts agree that [a] plaintiff must present a prima facie case but need not show that he is certain towin." 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2948.3 (West 2008).

"The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Smyth*, 282 F.3d at 276. *See also Unicorn Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 205 (2d Cir. 1966) (noting that a trial court need not find that the party seeking a preliminary judgment

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1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

ultimately would prevail on the merits in order to issue a preliminary injunction). Here, the majority ignores certain evidence in order to reach its decision. Instead of considering all the evidence in the record, as the district court did, the majority ignores various statements made by School Board members which suggest and sometimes even admit impermissible motives in the removal decision. Since this was not a trial on the merits but was instead a preliminary injunction hearing, the credible and persuasive evidence was sufficient for the district court to have found a substantial likelihood of success on the merits.

Although I agree with the majority that the plaintiffs have failed to establish a substantial likelihood of success on their due process claims, I disagree with its conclusion on the First Amendment claim. I find no abuse of discretion by the district court, which conducted a searching and thorough analysis of the evidence, deciding the case solely on law and precedent.

A. The First Amendment Claim

We are without much precedent to help us decide the extent to which the First Amendment applies to school library book removal decisions. But the precedent we do have does not, in my view, support the majority's conclusion.

I agree with the majority that Justice Brennan's plurality decision in *Pico* is of limited precedential value, in the absence of a majority opinion joined by four other justices. I also agree that the First Amendment does not forbid a school

board from removing from its shelves books that contain gross factual inaccuracies. Nor do I disagree with the proposition that a school board may remove a book because it is educationally unsuitable. I part company with the majority on its conclusion that the Miami-Dade County School Board's actual motive for ordering *Vamos A Cuba* from the shelves of its library was because of "gross factual inaccuracies" or "inaccuracies by omission."[3]

Although school boards are vested with wide discretion to decide what books occupy its library shelves, I do not believe that the First Amendment permits a school board to ban a book for the purpose of suppressing the viewpoints expressed in the book, when the educational content of the book is otherwise innocuous. *Vamos a Cuba,* which is simply a part of an apolitical, superficial geography series, is only 26-sentences in length. I

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[3] The majority twists my meaning in its opinion, implying that I somehow believe "that the Constitution obligates a government entity to place falsehoods, whether gross or ungross, on the shelves of school libraries." [Majority Opinion at 96 n.15.] I do not. Plainly, school boards may remove books from library shelves which contain falsehoods. However, they may not when their primary motivation for removing the books is viewpoint discrimination, and the books' falsehoods are a pretext for that genuine motivation. My dispute with the majority is not about "what the Constitution obligates" but instead what the evidence shows motivated the School Board to make its removal decision. Moreover, the majority makes much of my use of the word "gross" in front of "inaccuracies." I do this only because this is why the School Board claimed it was motivated—that it removed *Vamos a Cuba* because it was filled with "gross inaccuracies."

attach, in its entirety, the text as an Appendix. Having read the book and independently examined the entire record, I agree with the district court that the School Board's claim that *Vamos a Cuba* is grossly inaccurate is simply a pretense for viewpoint suppression, rather than the genuine reason for its removal. The record supports the district court's determination that the book was not removed for a legitimate pedagogical reason.

The majority declines to determine whether the standard set forth in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562 (1988), or the standard set forth in *Board of Education v. Pico,* 457 U. S. 853, 102 S. Ct. 2799 (1982), applies to school library book removal decisions, finding that "even if the plaintiffs . . . got the [standard] of their dreams," the test articulated by a plurality of the Supreme Court *Pico,* the plaintiffs would still lose because the School Board removed *Vamos a Cuba* for "legitimate pedagogical reasons." [Majority Opinion at 50-51.] I also do not determine which standard applies, as I find that even under the more lenient standard the Court set forth in *Hazelwood,* the plaintiffs demonstrated a substantial likelihood of success on the merits.

Under the more lenient standard in *Hazelwood,* a school board may regulate expression related to curricular materials so long as the school board's motivation is "reasonably related to legitimate pedagogical concerns." *Hazelwood,* 484 U.S. 260, 273, 108 S. Ct. 562, 571 (1988). This standard does not, however, permit a school board

to engage in viewpoint discrimination. *Searcey v. Harris,* 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). "The prohibition against viewpoint discrimination is firmly embedded in [First Amendment] analysis." *Id.* at 1325 (citation omitted). Therefore, we have held that "we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id.* (citing *Virgil v. Sch. Bd. of Columbia County,* 862 F.2d 1517, 1522-23 & n.6 (11th Cir. 1989)). We must decide whether a political motive was the motivating or decisive factor in a school board's decision to remove a book. *Pico,* 457 U. S. at 872, 102 S. Ct. at 2810. This record demonstrates that, even under the *Hazelwood* standard, the School Board engaged in viewpoint discrimination, and that this viewpoint discrimination was the decisive factor in its motivation when it removed *Vamos a Cuba* from its libraries. The greater weight of the credible evidence supports the district court's finding "that the majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision." *ACLU,* 439 F. Supp. 2d at 1283.

State-supported censorship of speech based on political viewpoint offends the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S.

624, 642, 63 S. Ct. 1178, 1187 (1943). This bedrock of the First Amendment applies with special force to the protection of children, a principle recognized by the district court when it concluded in its order:

> [I]t is the primary function of our schools to prepare their students for citizenship. Students will practice this "citizenship" in a country which prizes diversity and dissent. Hence, our schools must embody intellectual openness, lest they teach youth to discount important principles of our government as mere platitudes. The First Amendment ensures wide exposure to that robust exchange of ideas upon which the Nation's future depends. The School Board may not use its inherent power to expunge the expression of disfavored ideas.

ACLU, 439 F. Supp. 2d at 1288. The district court's analysis here is faithful to Supreme Court guidance: "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967) (alterations and quotations omitted). In Justice Brennan's words:

> [T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of

> his own rights of speech, press, and political freedom. . . . [J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.

Pico, 457 U.S. at 867-68, 102 S. Ct. at 2808-09 (emphasis omitted). Here, the School Board's own Collection Development policy recognizes these principles, encouraging the acquisition of "[m]aterials on controversial issues representing various views in order that young citizens may develop, under guidance, the practice of critical analysis and intellectual integrity in forming judgments." [PI Exhibit 43.]

There is perhaps no more important place for guarding free speech principles than in our Nation's schools. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512, 89 S. Ct. 733, 739 (1969) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting *Keyishian*, 385 U.S. at 603, 87 S. Ct. at 684). It is axiomatic that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S. Ct. at 736. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are

not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes." *Barnette,* 319 U.S. at 637, 63 S. Ct. at 1185. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Id.* at 511, 89 S. Ct. at 739. "[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian,* 385 U.S. at 603, 87 S. Ct. at 683. "Hence, our schools must embody intellectual openness, lest they teach youth to discount important principles of our government" as trivial. *ACLU,* 439 F. Supp. 2d at 1288.

If the school is one of the most important laboratories for application of free speech principles, then its library is perhaps the most important. *See Pico,* 457 U.S. at 868, 102 S. Ct. at 2809 ("[T]he special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.") (emphasis omitted). Nowhere can a student better expose herself to the multitude of ideas so vital to nurturing the participation of young people in a pluralistic society. Thus, "students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding" in the school library. *Keyishian,* 385 U.S. at 603, 87 S. Ct. at 684 (quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 250, 77 S. Ct. 1203, 1212 (1957)). It is "a mighty resource in the free marketplace of ideas." *Minarcini v. Strongsville City Sch. Dist.,* 541 F.2d

577, 582 (6th Cir. 1976). The school library, "no less than any other public library, is 'a place dedicated to quiet, to knowledge, and to beauty.'" *Pico*, 457 U.S. at 868, 102 S. Ct. at 2809 (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)). "In [a] school library a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. The student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom." *Id.* at 869, 102 S. Ct. at 2809 (alterations, citations, and quotations omitted).

Because the school library occupies a unique place in the educational system as a place for voluntary study, school boards "must discharge their important, delicate, and highly discretionary functions within the limits and constraints of the First Amendment." *Id.* at 865, 102 S. Ct. at 2807 (quotations omitted). Students' First Amendment rights may be "directly and sharply implicated by the removal of books from the shelves of a school library." *Id.* at 866, 102 S. Ct. at 2808.

While school boards are accorded wide discretion in the management of school affairs, that discretion is not unlimited. They have "important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *Barnette*, 319 U.S. at 637, 63 S. Ct. at 1185. A school board may remove a book from a school library for legitimate pedagogical reasons, such as obscenity or factual inaccuracy. But if a school board's motive for removal is suppression of a viewpoint

expressed in the book, its removal decision is unconstitutional. *Searcey*, 888 F.2d at 1319 n.7; *Virgil*, 862 F.2d at 1522-23 & n.6. Here, the School Board claims that it removed *Vamos a Cuba* because of factual inaccuracies and omissions, rendering the book educationally unsuitable. The plaintiffs dispute the School Board's actual motive for removing the book, claiming the School Board was motivated to suppress the content-neutral and apolitical viewpoint about Cuba expressed in the book.

The majority reverses the district court and concludes that the School Board removed *Vamos a Cuba* because of factual inaccuracies that paint Cuba under the Castro regime in a falsely positive light. It finds that the district court's reasoning is flawed because "[the district court] never comes to grips with the substance of the School Board's position, which is that representations made in *Vamos a Cuba* falsely portray a life in Cuba that does not exist and that in reality life under the Castro regime is bad—really bad." [Majority Opinion at 95.]

I read the district court's order differently. The district court concluded that the School Board's stated reasons for removing the book were merely a pretext for the political views prevalent in Miami that oppose the Castro regime. This conclusion is altogether separate from any determination about quality of life in Cuba. In fact, the district court acknowledged the dire situation in Cuba. *E.g. ACLU*, 439 F. Supp. 2d at 1265 (noting that "the Cuba Books omit the harsh truth

about totalitarian life in Communist Cuba"). It empathized with the Cuban American community. *Id.* at 1284 (noting the painful experiences Cuban Americans endured "under an oppressive totalitarian regime"). But recognizing that life in Cuba is oppressive does not justify constitutionally impermissible viewpoint discrimination. The greater weight of the record evidence supports the district court's finding that the School Board acted in a narrowly partisan, political manner in furtherance of ideological viewpoints, in a way that the First Amendment forbids, when it voted to remove *Vamos a Cuba* from its library shelves.

The School Board claimed it removed *Vamos a Cuba* because of factual inaccuracies and omissions, which render the book educationally unsuitable. For example, it claimed that the book's statement that "people in Cuba eat, play and go to school *like you,*" [*Vamos a Cuba*: 5 (emphasis added)], is an inaccurate portrayal of life in contemporary Cuba. The district court, however, found that the evidence of viewpoint discrimination was "overwhelming." *ACLU,* 439 F. Supp. 2d at 1282. It found that the "greater weight of the more persuasive and credible evidence at the preliminary injunction hearing [demonstrated] that the majority of the Miami-Dade County School Board members intended by their removal of the books to deny school children access to ideas or points-of-view with which the school officials disagreed and that this intent was the decisive factor in their removal decision. In so acting, the School Board

abused its discretion in a manner that violated the transcendent imperatives of the First Amendment." *Id.* at 1283.

The district court further concluded that although "the debate [at the School Board meetings] was couched in terms of 'inaccuracies' contained in the Cuba books, the real issue was that the Cuba books were content neutral and scrupulously apolitical, and did not reflect, as viewed by the majority of the School Board numbers, the true evil of Castro's government and the oppression of the Cuba people." *Id.* According to the district court,"the gist of the argument, however, is that the books were too objective and, therefore, should be banned." *Id.*

1. Statements in Connection with the Removal Decision

The Eleventh Circuit "ha[s] not hesitated to look beyond the stated reasons for school board action." *Virgil,* 862 F.2d at 1522 n.6. While the majority finds that "the School Board majority[] [made] consistent statements that it was removing *Vamos a Cuba* from the school library shelves because of factual inaccuracies," [Majority Opinion at 109], I find little factual support for this conclusion in the record. Instead, I find numerous statements that demonstrate that other motivations were at work.

The record is rather clear that from the beginning of the removal process, the primary motivation for removing *Vamos a Cuba* was the favoring of one particular political viewpoint over another. A parent's complaint launched the review

process. The parent, Juan Amador, complained that "[a]s a former political prisoner from Cuba, *I find* the material to be untruthful" because "[i]t portrays a life in Cuba that does not exist." [R:19:296] (emphasis added). Amador's objection was that the book was not based on *his* perspective, that of the Cuban exile. "The merit or truth of [his perspective] is not the issue. . . . Tragically, that point-of-view is based on real life experiences that members of the Cuban Community and their families have painfully endured in Cuba before coming to this country, and which many who have remained continue to endure under an oppressive totalitarian regime." *ACLU,* 439 F. Supp. 2d at 1284. The issue instead is the state's imposition of what shall be the orthodox view of Cuba—the First Amendment does not permit that one perspective officially dominate the discourse.

The record provides palpable support for the district court's conclusion that School Board members banned the book not because of inaccuracies per se but because the book failed to make a negative political statement about contemporary Cuba. For example, School Board member Frank J. Bolanos described certain passages of the book as "distortions" and, after each "distortion," he added his own comments on the subject matter, which he labeled as "reality." Each "reality" demonstrates ideological opposition to the Castro regime. For example, Mr. Bolanos called the passage, "The people of Cuba eat, work and study like you," [*Vamos a Cuba*: 5], a "distortion." His corresponding "reality" was:

> Nothing could be further from the truth. The people of Cuba survive without civil liberties and due process under the law and receive 10 to 20 year prison sentences for simply writing a document or voicing an opinion contrary to the party line. People are told where to work. They lose their job if they do not follow the dictates of the communist party. Children are indoctrinated and forced to chant Castro's greatness in class.

ACLU, 439 F. Supp. 2d at 1251. He also labeled the passage, "White rice is the most common food in Cuba. Black beans are eaten. Arroz con Pollo is another favorite dish," [*Vamos a Cuba*: 12], a "distortion." His corresponding "reality" was: "Food is rationed; people stand in line for hours to ask for their measly ration only to be told they ran out. Children stop receiving their milk ration at age six." *ACLU*, 439 F. Supp. 2d at 1251. He called the passage, "The major celebration in Cuba is 'Carnival.' It is celebrated on July 26th," [*Vamos a Cuba*: 26], a "distortion." His corresponding "reality" was:

> The annual commemoration of July 26th is the symbolic observation of the rise to power of Castro's communist, totalitarian regime. It is a day of mourning for most Cubans. Cubans celebrate the 20th of May and the 28th of January, to celebrate their independence from Spain and

> the birth of Jose Marti, Cuba's greatest national hero.

ACLU, 439 F. Supp. 2d at 1251. Lastly, he labeled the passage, "The celebrations in Cuba are a mix of African and Catholic roots," [*Vamos a Cuba*: 27], a "distortion." Mr. Bolanos' stated that in reality:

> Historically, Castro's regime has prohibited or chastised those that engage in religious practices, including the Catholic Church and other organized forms of religion. Religious leaders, including Jehovah's Witnesses have been imprisoned. A famous cry while facing Castro's firing squad was "Viva Cristo el Rey" (long live Christ the King).

ACLU, 439 F. Supp. 2d at 1251-52. Mr. Bolanos argued that the book was rife with distortion because it omitted negative political information about the Castro regime, including omissions regarding political subjects such as civil liberties, due process, freedom of speech, government indoctrination, food rationing, and religious freedom. While Mr. Bolanos' viewpoints may be correct, I find no support in the law for the state requiring a book to carry a political viewpoint.

The majority questions my discussion of Mr. Bolanos' remarks. [Majority Opinion at 80 n. 11.] My analysis should not be understood as questioning the truth or accuracy of his remarks. Indeed, life in Cuba is as bad as Mr. Bolanos makes it out to be. I analyze Mr. Bolanos'

"distortions" and "realities" to point out that his statements are concerned with the exclusion and inclusion of political statements from a particular viewpoint. The majority also faults me for putting the words "distortion" and "reality" in quotation marks, finding that this punctuation somehow means that I do not believe the truth of the statements. The majority mistakes my meaning. I use the quotation marks to designate that these were Mr. Bolanos' statements, statements which, contrary to the majority's contention, evidence that the School Board did not consistently state that it was removing the book because of inaccuracies. I am attempting to determine whether the School Board's proffered reason for removing the book was pretextual, and nothing more.

Mr. Bolanos described the book as "hurtful and insulting to both our Cuban-American community and those Cubans still living on the island under oppressive conditions." *ACLU,* 439 F. Supp. 2d at 1251. He criticized the School Board's book review process as one that would not "satisfy the segment of our community that is outraged, that feels discriminated against by this book." [April Transcript, 73:3-73:11.] Some exiles want the discourse to reflect their plight, and they are "outraged" because the book does not conform to this message.

Several School Board members referred to their Cuban birth and their experience as exiles as explanations for why they found the book offensive. For example, School Board member Logan asserted that she wanted the book removed "as

somebody who suffered [in Cuba] firsthand." [April Transcript, 69:20-69:22.] School Board member Hantman prefaced her opinion by saying: "I am a Cuban American. I was born in Cuba. And as the other board members said, my family, and my father and mother lost everything they had worked for." [April Transcript, 80:13-80:22.] She later stated, "I suffered and my family suffered with the rise of Fidel Castro." [June Transcript, 22:17-18.]

School Board member Perez also demonstrated her motivation for objecting to the book when she remarked that the book "is especially damaging to the sensibilities of this community." [April Transcript, 62:7-62:9.] The sensibilities to which she referred are those sensibilities that are hostile to the Cuban government and are intolerant of contrary, less hostile, views. She compared *Vamos a Cuba* to books about "pornography. . . , devil worship and other offensive things like that." [April Transcript, 60:9-60:12.]

School Board member Barrera acknowledged the accuracy of the picture on the cover of *Vamos a Cuba* showing children in their school uniforms—"to the average person it is just kids in school uniforms." [June Transcript, 11:10- 11:11.] But, he continued, "as a Cuban, and to the Cuban American community, . . . that [picture] represents what is there today, which is the dictatorship of Fidel Castro. So, yes, we are offended. Even though it doesn't say anything, but the cover of that book is offensive to us as a community." [June Transcript, 11:11-18.] Mr. Barrera objected because

the book merely displayed the picture and neglected to comment negatively on the school uniforms and their symbolic connection with Castro.

Mr. Barrera was also bothered by the portrayal of Cuba as normal—"just kids in school uniforms." [June Transcript, 11:10-11:11.] "To present Cuba as a normal place is unacceptable to exiles because it negates the very reason for their exile and struggle. The adamant rejection of normalcy accounts for the strong desire to remove from the library shelves a book that treats Cuba as the same as any other country." *ACLU,* 439 F. Supp. 2d at 1284 n.37 (quoting [R: 19:281.]). Similarly, District Materials Review Committee (DMRC) members Balcells and Dr. Usategui explained that the books "present a portrayal of life in Cuba for young children as being normal, benign, and politics-free-with a focus of trying to draw human parallels showing that life is relatively the same as in other countries." [R:19:457.] Their criticism is grounded in a portrayal of Cuba as normal and apolitical.

The majority responds that to say the evidence reflects improper motive "confuses interest with motive." [Majority Opinion at 102.] It argues that Cuban Americans are more interested than others in removing false books about Cuba, and that they are "offended" only by the "inaccurate portrayal of life in Cuba." [Majority Opinion at 103.] The distinction between motive and interest has little merit in this context. The various comments made by School Board members, as I discussed above, reflect that it was not only inaccuracies that

offended them. To the contrary, the cover of the book, which Mr. Barrera admitted was accurate, was offensive because of the Cuban school uniform's symbolic connection with that which he abhors.[4] The record supports the conclusion that the School Board was not merely interested in removing a book full of inaccuracies; it was motivated to remove a book that symbolically represented something with which it disagreed.

Some members of the Cuban American community attended the School Board meetings and demonstrated their intolerance to messages that fail to conform to their personal experiences. One member of the DMRC, Ronald Bilbao, described the environment at one of the meetings, as "very scary." [Supplemental Bilbao Declaration at p. 3.] He noted that "it was packed with people from the community who kept interrupting. Security guards were standing by. I felt intimidated and I was afraid to speak freely at the meeting." [*Id.*] When a DMRC member said something about the book being accurate, some would whisper "communist" and hiss. [*Id.*] For example, when the DMRC discussed the passage regarding the Carnival

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[4] The majority opinion points out that just as the Cuban schoolchildren in uniforms offended a School Board member, "[t]he Hitler Youth wore uniforms, too, and that uniform was symbolically connected to that which many people abhor about the Third Reich." [Majority Opinion at 98-99 n. 16.] I do not doubt this. However, I would not censor a book which depicted a picture of Hitler Youth, either. The First Amendment forbids the state from prescribing political orthodoxy, no matter how abhorrent the alternative message. The majority opinion seems to add inflammatory rhetoric about Hitler where it has little relevance.

celebration at page 26 of the book, which says, "Cuba's biggest celebration is called Carnival. It is held on July 26. People dance and sing at this festival," a member, Mr. Rivera, said that this was inaccurate because "[the book] doesn't also say that people who live there are required to go to the festival." [*Id.*] Mr. Bilbao replied "that as far as [he] could tell the book is accurate, it just doesn't add that people have to attend." [*Id.*] In response to this comment, Mr. Rivera got angry with Mr. Bilbao and members of the community hissed at Mr. Bilbao and called him a communist. [*Id.*] He spoke only that one time at the meeting because he felt intimidated. [*Id.*] Members of the audience at the meeting "kept pressuring [Mr. Bilbao]" and telling him "that the book was offensive and hurtful to the Cuban community." [*Id.*]

The Superintendent of the Miami-Dade County School System also noted the intense political pressure from the community:

> I have listened carefully to the citizens who have come to address the School Board . . . and have been struck by some disturbing signals of intolerance, which left unaddressed could threaten the progress and the harmony that has marked our community over the last decade. Divisive rhetoric only damages the fabric of our society. However, respectful, open and frank discussions about our differences and cultures lead to understanding

> and build bridges of acceptance. There can be no doubt that the issues raised at recent Board meetings must be dealt with in ways that reflect respect for different opinions and sensitivity to views held by both the majority and the minority. . . . There is no "easy fix" to the complex issues we are contemplating; we can teach children that even the most twisted knots can be untied by citizens willing to work together for solutions that recognize many legitimate interests and concerns.

Memorandum from Superintendent of Schools Crew to Deputy Superintendent Dunbar, May 22, 2006, [R:19:35-26.]

The intensity of the feelings in the Cuban American community in Miami was not lost upon the district court:

> Nothing written here is intended to cast doubt upon the heartfelt point-of-view expressed by Mr. Bolanos and his supporters. Tragically, that point-of-view is based on real life experiences that members of the Cuban Community and their families have painfully endured in Cuba before coming to this country, and which many who have remained have continued to endure under an oppressive totalitarian regime.

ACLU, 439 F. Supp. 2d at 1284. But a sensitivity to the horrors of the Castro regime does not permit state-sponsored censorship of other viewpoints, as the district court noted:

> [M]any have come to this nation, and continue to do so today, for the opportunity to live in freedom under the protection of our Constitution and Bill of Rights. The quintessential freedom of speech may not be sacrificed on the altar of beliefs no matter how firmly those beliefs are held. In this nation, we do not prohibit the expression of an idea simply because some in the community find it offensive or disagreeable.

Id.

There was prior precedent supporting the district court's decision to grant the motion for preliminary injunction. A Miami museum had held an auction of art created by artists who had not renounced the Castro regime or continued to live in communist Cuba. *Cuban Museum of Arts and Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1122 (S.D. Fla. 1991). Outraged by the museum's tolerant attitude toward contemporary Cuba, the auction was held amidst hostility and threats in the Miami community. *Id.* One of the paintings was purchased and burned in the streets as a crowd chanted its opposition to the artists. *Id.* A bomb exploded under the automobile of a director of the museum. *Id.* Members of the museum's executive committee were pressured to resign, and those that

did not "endured McCarthy-like allegations of communist inclinations and sympathies." *Id.* Eventually, following years of controversy, a Miami city commission decided not to renew the museum's lease. *Id.* at 1124. The museum brought an action to enjoin the city, claiming the controversial art was subject to First Amendment protection. *Id.* A district court enjoined the city from evicting the museum, holding that the controversial art was subject to First Amendment protection and the city's asserted grounds for evicting the museum were either minor concerns or a pretextual basis upon which to remove the museum. *Id.* at 1129. The court found that the city commission "appear[ed] to have fallen victim to the local community's intolerance for those who chose to" exhibit artwork by artists who expressed a contrary political viewpoint to the Castro regime. *Id.* at 1126.

Similarly, here the School Board, a politically elected body, was faced with intense community pressure. A member of the Miami community confirmed at a School Board meeting: "There is a narrow group of Cuban Americans, a small group, a small sector, very powerful, politically strong that imposes their will on the Cuban community and everybody else in Dade County to fear, to threat, to intimidation." [R:19:310:14-310:19.] School Board member Robert Ingram illustrated the inordinate pressure the School Board was under to remove the book when he said that if the members of the School Board did not vote to remove the book, "they can't walk out of

here. If they don't vote for it, they can't go home, they might find a bomb under their automobiles. . . ." [R: 19:430:16-18.] As in *Cuban Museum of Arts and Culture*, "[e]ven if [the School Board members'] personal feelings were properly set aside, [the School Board] was obviously influenced by the local community's outrage and public outcry over" a book that failed to reflect politically orthodox views toward Cuba. 766 F. Supp. at 1126. The evidence also shows that personal feelings were not always put aside; indeed, School Board member Hantman explained that her decision to ban the book was grounded "firmly in[her] commitment to stand with the Cuban American community, [of] which [she is] a very proud member." [June Transcript, 21:17-19.] She further stated that she "would not be doing her job as a Cuban American" if she did not vote to remove the book. [June Transcript, 24:21-23.]

The record contains observations by educators, most of whom were themselves employed by the School Board, who consistently assured the Board that whatever omissions and inaccuracies there were in the book were not significant enough to remove the book for a legitimate pedagogical reason. One School Board member explicitly admitted this: "The 22 professional educators who reviewed this book have affirmatively determined that [the book does not have serious, material, irrevocable and clear inaccuracies and biases], therefore, we are here today in essentially a political process." [June Transcript, 34:23-35:2.] Furthermore, "[t]he record should reflect that this issue has been driven by Phone-A-Thons, phone banking,

radio, newspaper articles, e-mail campaigns, letter writing campaigns. . . . We are rejecting the professional recommendation of our staff based on political imperatives that have been pressed upon members of this board." [June Transcript at 35:5-35:15.] Certainly a School Board is a political body that must serve its constituents. However, the School Board also took an oath to uphold the Constitution. No amount of political pressure can trump the First Amendment of the Constitution.

2. Circumstances Surrounding the School Board Debate

We are required to give some weight to "the circumstances surrounding the School Board's vote to remove the [b]ook [which] cannot help but raise questions regarding the constitutional validity of its decision." *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 191 (5th Cir. 1995). First, the School Board failed to consider, much less follow, the recommendations of two previous committees of professional educators and lay people retained to help guide the review process, whom the School Board's attorney admitted conducted "extensive analysis and deliberations." [R:19:116.] The committees consistently found that *Vamos a Cuba* was educationally suitable, noting that it was "scrupulously apolitical," "factually accurate, and developmentally appropriate." [*E.g.* Ad Hoc School Materials Review Committee Evaluation of Instructional Materials.] The School Board's failure to consider the advice of professional educators or librarians, or even the Superintendent, reinforces the suspicion that the School Board's

motivation was constitutionally impermissible. *See Campbell,* 64 F.3d at 190-91 (noting that "fail[ing] to consider, much less adopt, the recommendation of two previous committees to restrict the Book's accessibility . . . in apparent disregard of its own outlined procedures—has the appearance of [improper] motivations"); *Pico,* 457 U.S. at 874-75, 102 S. Ct. at 2811-12 (finding that ignoring the advice of literary experts, librarians, teachers, and the Superintendent, may support suspicions that a school board's motivations were unconstitutional).

Second, one School Board member attempted to have the Board violate the Board's own rules and circumvent the appeals process set out by School Board rule, proposing that the School Board immediately remove *Vamos a Cuba* without waiting for the administrative process to proceed. The Board eventually voted 6 to 3 to allow the administrative process to run its course, but only after the School Board's attorney advised the School Board to remain "mindful of its own board rule and follow all levels of due process procedures in our book removal process." [April Transcript, 56:19-56:24.] Further, counsel reminded the School Board that the School Board rules did not allow the School Board to "act independently and remove a book that it finds objectionable. Rather, it must follow the process that is in that rule in order to achieve that purpose." [April Transcript, 58:16-58:22.]

Third, the School Board eventually did violate its own procedures when it voted to

remove the entire *A Visit to* series of which the book is a part. None of the other 19 books in the geography series were ever reviewed for accuracy by a review committee or the Superintendent per the School Board's rules, nor were they previously questioned on appeal. Most of the School Board members had not even read the rest of the series before they voted. The School Board's reluctance to follow its own procedures in connection with the series as a whole raises more questions about its School Board's motivations. *Id.* at 190-91 (noting that "apparent disregard of [a school board's] outlined procedures . . . has the appearance of 'the antithesis of those procedures that might tend to allay suspicions regarding the [s]chool [b]oard's motivations'") (quoting *Pico,* 457 U.S. at 875, 102 S. Ct. at 2812 (alterations omitted)); *Case v. Unified Sch. Dist. No. 233,* 908 F. Supp. 864, 875 (D. Kan. 1995), *aff' d in part and rev'd in part on other grounds,* 157 F.3d 1243 (10th Cir. 1998) (finding that the "irregular and erratic manner in which [the school board] removed [a book] from the District's libraries and their disregard of established policy and procedure are important evidence of their improper motivation"). The fact that the School Board removed books that many of its members had never even read further suggests that the School Board majority may have had impermissible motives for removing the book from the library shelf. *Campbell,* 64 F.3d at 191 (finding "question[able] . . . the constitutional validity of [the school board's] decision" when many school board members had not read the book in question or had not read its

entirety).

The content and circumstances of the debate cast doubt on the School Board's proffered motivation that it removed the book because of factual inaccuracies.

3. The School Board's Proffered Inaccuracies and Omissions

The majority finds that "[a] fact of great significance in deciding whether the School Board was motivated to remove *Vamos a Cuba* because of inaccuracies is that the book indisputably does contain inaccuracies." [Majority Opinion at 72.] The majority says that it is undisputed "that the book . . . contain[s] inaccuracies" and that "[i]f there had been no factual inaccuracies, the book would not have been removed." [Majority Opinion at 109-10.] My independent view of the record, however, fully supports the district court's determination that these inaccuracies were merely post hoc rationalizations for the book's removal—"plausible but disingenuous justifications." *ACLU*, 439 F. Supp. 2d at 1282.

The majority faults the district court for going through this very exercise, stating that "[t]he district court's decision about educational suitability is . . . wrong for the . . . fundamental reason that it was not a matter for the district court to decide, [as] [s]uch questions are the perfect example of a core educational policy matter within the exclusive province of local school boards." [Majority Opinion at 105.] But the district court's purpose in examining the educational

suitability of the books was to get to the heart of the actual motivation on the part of the School Board, which the Supreme Court requires. *See Pico,* 457 U. S. at 870, 102 S. Ct. at 2810 (holding that while school boards "rightly possess significant discretion to determine the content of their school libraries . . . that discretion may not be exercised in a narrowly partisan or political manner"); *see id.* at 907, 102 S. Ct. at 2828-29 (Rehnquist, J., joined by Burger, C.J. and Powell, J., dissenting) ("cheerfully conced[ing] [that school boards] may not exercise[] [their discretion] in a narrowly partisan or political manner"); *Zykan,* 631 F.2d at 1306 ("[N]othing in the Constitution permits the courts to interfere with local educational discretion *until* local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute.") (emphasis added). Federal courts must engage in some analysis of the educational suitability of a book if this is the suggested basis of a school board's decision. Here, the Miami-Dade School Board found "that the book was inaccurate and contains several omissions." [R:19:172.]

In order for a court to determine if the proffered reason for removal was pretextual, it must evaluate those findings. A court must evaluate whether the proffered motivations have such weaknesses, implausibilities, or incoherencies such that they are unworthy of credence. Contrary to the majority's suggestion, we do not overstep our bounds by evaluating educational

suitability for this limited purpose. *See Virgil*, 862 F.2d at 1517 n.6 ("Courts have not hesitated to look beyond the stated reasons for school board action."). Only the School Board has the authority to determine whether a book's content makes it suitable for the school library shelves. But after carefully reviewing the evidence, the district court concluded that the School Board removed the book not because of its factual inaccuracies, but because a majority of the School Board agreed with the members of the community who considered an apolitical picture of Cuba to be offensive. *Cf. Pratt v. Ind. Sch. Dist. No. 831*, 670 F.2d 771, 778 (8th Cir. 1982) (holding that a school board could not constitutionally ban films from the school curriculum because a majority of the school board objected to the ideological and religious content of the films). I do not "decide" the educational suitability question, as the majority contends that I do. [*See* Majority Opinion at 107.] Instead, I scrutinize the School Board's proffered omissions and inaccuracies to see whether there are such weaknesses, implausibilities, and incoherencies in the record to support the district court's determination regarding the genuine motivations for the removal decision.

a. The School Board's Proffered Omissions

The vast majority of educators that reviewed the book found that the omissions on which the School Board eventually relied to remove it did not affect its educational suitability. In fact, the

omissions about which the plaintiff complained, if included, were found to be developmentally inappropriate and would render the book educationally unsuitable. [R:19:267:¶17.] (finding that the type of information the objectors found was omitted from the book "would be detrimental to a child's understanding of the world at a very young age"). As the district court found, the School Board's concerns with *Vamos a Cuba* seem to be "based on an adult attempting to import an adult value system into a children's book." *ACLU,* 439 F. Supp. at 1287. The book was written for children ages four to eight.

The School Board complained that various facts relating to the Cuban government were omitted from the book. One of the School Board's experts, Dr. Juan Clark, listed the book's omissions of facts, which included the regime's rationing of consumer goods, limitations on private enterprise, the agricultural system, government-control and indoctrination of the education system, and child labor. [R:19:47-48.] The plaintiffs' experts Lucia Gonzalez and Patricia Scales considered the inclusion of such information in children's books. Ms. Gonzalez found that children in this age group cannot grasp "the level of political thought implicit in" these omitted facts. [R:19:267:¶17.] Ms. Scales noted that they do not understand the concept of "government" in any sophisticated way. [R:19:255:¶16.] Rather, educators introduce young children to concepts including "community or culture, . . . self, and how they fit in, and their understanding of these concepts is only the most

basic at this age level." [R:19:255:¶16.] The record supports the conclusion that these omissions would have been inappropriate to include in light of the conceptual understanding of children in this age group.[5]

The book attempts to illustrate complicated subjects in simple ways. For example, an in-depth discussion of Cuba's complicated transportation systems is omitted from the book. However, the book does explain the transportation situation. As the School Board's expert Dr. Clark asserted, Cubans cannot buy new cars, public transportation is overcrowded, and foreigners do not take buses. But nothing the book says paints a different picture—the book reads: "[T]here are not many cars . . . [and] most Cubans travel by bus." [*Vamos a Cuba*: 18.] As such, Dr. Clark's omission is not so much an omission as a developmentally appropriate way of presenting information to children in the early grades of elementary school.

Similarly, the technical information about houses and buildings that Dr. Clark noted was

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[5] The majority suggests that these subjects may be able to be presented in an age-appropriate manner, though it recognizes that the experts disagree on this point. [Majority Opinion at 82.] But even the School Board's expert, Dr. Usategui, admitted that such subjects "are difficult concepts for this age group." [*Id.* (quoting [R:27:129:¶12.])] Dr. Usategui admitted that such difficult subjects, like "hardships of other children," could be taught through only limited means, such as "participating in activities that help underprivileged children, such as toy drives." [*Id.* (quoting [R:27:129:¶12.] Dr. Usategui never suggested that such difficult information could be properly presented in a book, but only through other means.

omitted "would be giving [children] more information than they would need, want or could comprehend," according to Ms. Scales. [R:19:255:¶18.] Dr. Clark objected that the book only notes that there are new and old buildings without noting that some buildings are deteriorated. [R:19:47.] But such factual detail would be lost on a reader in this age group. [R:19:256:¶18.] "Children are far less patient than adults and will not wade through factual and technical details." [R:19:256:¶18.] Children need to know information could be properly presented in a book, but only through other means. only the concise fact that there are new and old buildings, as *Vamos a Cuba* points out at page 10. [R:19:256:¶18.]

It could well be that *Vamos a Cuba*'s simple depiction of life in Cuba does not contain information that would lead to a child's better understanding of it. According to the testimony of several of the plaintiff's experts, however, it is better to err on the side of caution in a young children's book. Giving too much inappropriate information, like the information regarding government discussed above, "is cognitively more damaging to young children than [giving] too little." *ACLU*, 439 F. Supp. 2d at 1287. The School Board's expert, Dr. Usategui, disagreed, stating that the book teaches "something different from what the children learn in their homes or from peers in their neighborhoods," which "can lead to cognitive dissonance." [R:27:128:¶11.] Dr. Usategui argued in essence that the public

school library shelves should not contain books which cast a pall on what is politically orthodox in the community. But the Supreme Court stated in *W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."

Furthermore, if included, the negative information about Cuba the School Board claimed was omitted could render the book developmentally inappropriate for children. The majority, in order to demonstrate the differences between Cuba and the United States, highlights negative information including "domestic violence, underage prostitution, sex tourism, [and] discrimination against persons of African descent." [Majority Opinion at 79 (quoting the Cuba Human Rights Report)]. According to Ms. Scales, however, an "important aspect of books written for young children is that they emphasize the positive." [R:19:256:¶20.] Negative subjects are inappropriate. Assuming it could even be understood by young children, negative information "has the danger of frightening children or inducing a sense of hopelessness that is both unnecessary and developmentally inappropriate." [R:19:256:¶20.]

The majority points out that two other books in the series include negative information, while *Vamos a Cuba* makes Cuba out to be "hunky dory." [Majority Opinion at 108.] First, the

negative information to which the majority refers is minor. The Cambodia and India books briefly touch on the war in Cambodia and poverty in India in one sentence each, while leaving out volumes of negative information that their respective Human Rights Reports include. That left out information would likewise render the Cambodia and India books developmentally inappropriate. Moreover, *Vamos a Cuba* does not depict Cuba as "hunky dory" by any means. The pictures depict Cuba as a poor country, with children missing articles of clothing (on page 10 a young boy is shirtless and on page 19 a boy is shirtless and shoeless), people engaged in manual labor, children also engaged in such labor, and outdated housing and cars. Some of the text verifies this—for example, at page 23, it reads: "Some children work in gardens. Older children may work in factories." Negative information is in fact included in *Vamos a Cuba*. More extreme negative information is left out, along with any negative political information.

The omitted information also falls outside the scope of a superficial geography book.[6] *Vamos a*

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[6] The majority makes much of my calling *Vamos a Cuba* a "geography" book. [Majority Opinion at 72 n. 7.] The district court also found that *Vamos a Cuba* was a "geography" book. *ACLU*, 439 F. Supp. 2d at 1287 (calling *Vamos a Cuba* "part of a series of geography books written for 4-6 year old children"). This factual finding by the district court is reviewed under a clearly erroneous standard. This would seem to be another instance wherein the majority engages in *de novo* review of an historical fact when it should have given greater deference to the district court. Additionally, the School Board admits that *Vamos a Cuba* is "geography" book. *Id.* at 1294 (quoting Defendants' Response to Plaintiffs' Supplemental Memorandum on Certain Preliminary Injunction Elements at 9)

Cuba is simply part of an apolitical geography series. Its overall purpose is "to offer very basic information to young children about the way of life in another country." [R:19:267:¶15.] The very title of the book tells the reader that he "will be taken on a brief visit through the pages of the book." [R:19:256:¶21.] If a young child were traveling, he would likely be taken to only certain places and would see only limited things. He would be shown a windmill in Holland, not the "Red Light" district in Amsterdam. [R:19:256:¶21.] He would be shown the Eiffel Tower, not the seedy sections of Paris. [R:19:256-57:¶21.] *Vamos a Cuba* introduces information children would want as young readers, and not beyond. "[*Vamos a Cuba*], like all the other books in the series, is simply meant to give small children a sense of what it's like to be a child in another country. One page in [*Vamos a Cuba*] shows a shirtless and shoeless little boy leading a team of oxen to a farm field. Should the text say it's a state-owned collective? I don't think so, although a

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(referring to the series as "geography books"). Last, according to Webster's New Twentieth Century Dictionary, "geography" includes the study of the "inhabitants . . . and industries of the" region. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 765 (1976). The majority seems to have a narrower conception of the study of geography than the dictionary has. In order to show that *Vamos a Cuba* is not in fact a geography book, it states that geography books are not about "whether [people in a country] face hardships." [Majority Opinion at 72 n. 7.] I agree. This is precisely my point—the School Board removed the book from the shelves because it did not contain information that it was never meant to contain, as it was well beyond the scope of a simple geography book.

knowledgeable parent could tell his child that. Assuming a 6-year-old would care." Michael Putney, *Let's Close the Book on Attempts to Censor*, MIAMI HERALD, April 19, 2006, [Plaintiff's Exhibit 20.]

A mother and teacher noted at a School Board meeting: "introduc[ing] the truth to children [is best done] in increments." [April Transcript, 20:10- 12.] A simple glimpse into life in Cuba stimulates the young child's interest so he will seek more complex information when he is older. [R:19:253-4:¶13.] Moreover, a parent may provide more information to satisfy his child's curiosities, just as the parent may show his child more than a windmill or the Eiffel Tower. *Vamos a Cuba* provides only a basic picture of Cuba and contains a section at the end of the book called "More Books to Read." [*Vamos a Cuba*: 32.] That section refers a curious reader to additional sources, including a more in-depth book with a recommendation that "an older reader can help you with this book." [*Vamos a Cuba*: 32.] Consequently, the young reader can build on the basic information he has just learned by seeking out more information about Cuba. "Not every book can be everything to every child," [Scales Cross, 115:8-9], which *Vamos a Cuba* implicitly recognizes by referring readers to further material.

The answer to books that do not provide all the information a reader wants is to find another book. If a reader is curious about the Castro regime, he can find another book that enlightens him further. Nothing in this book hinders that

process. To the contrary, it provides a simple glimpse into Cuba which will form the basis of a future, deeper understanding about the country. [April Transcript, 25:10-13] ("a child may not be ready to understand all of the horrors of the Castro regime, but this book can be used to start the discussion about true life in Cuba"). Even Mr. Amador, the father who made the underlying challenge to the book conceded: "The best thing that's happened here is that this has given me further opportunity to talk with my child, my daughter, about the reasons why we are here, and even though they may not understand still what I've been through and what so many of Cubans have been through, I hope some day they will understand. . . ." [June Transcript, 7:7-13.] Despite his purpose, Mr. Amador illustrated the marketplace of ideas.

b. The School Board's Proffered Inaccuracies

Many of the inaccuracies complained of are inconsequential, which casts doubt on whether those proffered motivations for the book's removal are worthy of credence. For example, one of the "inaccuracies" is that the book explained that Cuban music is played with maracas made of pumpkins. [*Vamos a Cuba*: 28.] Dr. Clark objected: "To say that maracas are made of pumpkins shows the utter ignorance of the writer on this matter. The maracas are made from the *guiro* fruit, dried and properly processed."[7] [R:19:217.] Yet, according to

[7] Only the Spanish version of the book says that maracas are made of pumpkins. The English version correctly says that the maracas are made of gourds.

the Dictionary of the Royal Spanish Academy, the *guiro* fruit in fact *is* a pumpkin. It is a type of gourd, which are in the same family as pumpkins. While it may have been more precise for the book to say that maracas are made from a *guiro* fruit or a gourd, it borders on frivolity to argue about whether a maraca is made from a pumpkin. [R:19:277:¶7.] Moreover, it is evident that explaining that a maraca is made from a *guiro* fruit will mean far less to an American four-year-old than explaining that it is made from a pumpkin, with which Halloween has rendered the four-year-old familiar. [R:19:277:¶7.]

The inaccuracy that Dr. Clark considers to be "probably the worst factual error in the book," [R:19:48], is at page 29: "In a Cuban valley, there are big colored paintings, on the rocks and caves. These were painted by Cuba's inhabitants about a thousand years ago." [*Vamos a Cuba*: 29.] The book includes a picture of a rock painting was done in the 1960s, not 1,000 years ago. [R:19:48] While some Cuban caves do indeed have prehistoric paintings, the one pictured in the book is not one of them. [R:19:278.] While this is misleading, it does not justify removing the book.

Another error listed by Dr. Clark is that Cuban houses are not made from palm trunks, as the book noted on page 11, but instead from the upper growth of the palm. [R:19:47.] This seems inconsequential, as a young reader will understand that the houses are made from the palm in any case.

In response to the School Board's complaints

about generalizations in the book about traditional customs and dress, Ms. Scales stated, "all similar non-fiction books about other countries for young children contain generalizations about traditional dress and customs. For example, a book about Scotland for children of this age would almost invariably highlight men wearing kilts when the reality is that these garments are rarely worn and are very tourist-oriented." [R:19:256:¶19.] Such generalizations do not render a book inaccurate so much as they simplistically illustrate Cuba's culture.

The book's sentence which has perhaps generated the most controversy is it's first sentence: "People in Cuba eat, work, and go to school like you do." [*Vamos a Cuba*: 5.] It appears fairly evident that this short sentence is meant to show simply that other children in other cultures also do those things. [R:19:255:¶17.]

The record supports the book's evident purpose, which "is to paint a very elementary picture of Cuban life and culture in a way that fosters cross-cultural understanding among young children." [R:19:278:¶8.] Explaining cross-cultural commonalities is "appropriate for the level of understanding for children in this age group." [R:19:255:¶17.] The book conveys the message that although Cuba may seem very different, when it comes to the essentials, all children are the same in that they also "eat, work, and go to school." It is important to note that *Vamos a Cuba* subsequently states, after the "like you do" comment, that "[l]ife in Cuba is also unique." [*Vamos a Cuba*: 5.] First the book stresses the common ground, then it

goes onto explain the differences.

Without some common ground it is difficult for a child to learn about what would otherwise seem too foreign. It would be inappropriate for a book that teaches children elementary notions of Cuban culture and society to present it the way the objectors would like: a place where, as the majority says, life is "bad—really bad," [Majority Opinion at 95]. Instead, "[t]he emphasis [is] on things people share in common, not what divides and drives them apart." *ACLU,* 439 F. Supp. 2d at 1288.

B. A Dangerous Precedent

The majority concludes that the book is "inaccurate because of what it does not say," in that it leaves out the horrors of the Castro regime. [Majority Opinion at 72.] Opening the door to the majority's interpretation of "inaccuracy" would lead to a host of challenges. [June Transcript, 34:4-34:11 (School Board member Greer pointing out that if the School Board adopts this standard then "next week we will have another complaint about another book from another group, and if this standard is applied, we will go through almost every book in our system with legitimate objections that people can raise about the omissions from their point of view of the content of those materials").] For example, a reference book for children about cars and trucks would be "inaccurate" without information about how their emissions contribute to global warming. Brief for American Booksellers Foundation for Free Expression et al. as Amici Curiae Supporting Appellees at 18, ACLU v. Miami-Dade County School Board, No. 06-14633

(11th Cir. Nov. 22, 2006). The sanctioned banning of a simple book like this would be logically supported by a finding that age-appropriate, politically neutral texts are rendered "inaccurate" by their omission of information that would express a particular political viewpoint.

I am also troubled by the majority's discussion about how the "book was not being *banned* . . . [but rather] *removed* from a school's library shelves." [Majority Opinion at 86.] The majority argues that because the book was removed from a school's library shelves, but could still be found in other public libraries in the area and was available for purchase, the booked was not banned. I disagree.

At the outset, I note that our argument here is largely semantical—what the majority calls "removal" I call banning. No matter what we call it, I would still find that the record supports that the School Board's removal/banning violated the First Amendment.

Nevertheless, the majority's definition of banning does not comport with the dictionary definition. According to Webster's New Twentieth Century Dictionary, "ban" means simply "to prohibit" or "to forbid." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 144-45 (1976). According to Black's Law Dictionary, it means "to prohibit, especially by legal means." BLACK'S LAW DICTIONARY 139 (7th ed. 1999). This is precisely what the Miami-Dade School Board did when it passed a resolution to prohibit, by legal means, public school libraries from carrying *Vamos a*

Cuba.[8] The School Board prohibited even the voluntary consideration of the book in schools. This book was not a part of the curriculum or required reading—it was a library book. The dictionary does not require, as the majority does, that one must be prohibited from having a book altogether for that book to be banned.[9]

Moreover, the majority's definition of the word does not comport with the common usage of the word. Indeed, it does not comport with our own Circuit's usage of the word. *See Virgil v. Sch. Bd. of Columbia County*, 862 F.2d 1517, 1525 (11th Cir. 1989) (suggesting that a book is "banned" if it is

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[8] The majority states that I "ignore[] the fact that the Board, and the Board alone, has the responsibility and authority under Florida law to decide what books are to be on the shelves of school libraries in its district," such that, under my understanding of the word, "when an entity decides to remove a book from its own library shelves it has banned itself from having that book." [Majority Opinion at 88-89]. The majority suggests that such an outcome is somehow absurd. I disagree. When a school board decides to remove a book from the school libraries within its district, it indeed has banned itself from having that book on its library shelves. If a school principal were to place *Vamos a Cuba* on the shelves of a Miami-Dade County school library, the School Board would order it removed. This amounts to what the majority deems so absurd: "bann[ing] itself from having that book."

[9] I am unconvinced by the majority's assertion that if removing a book from the library shelves in an act of banning, "deciding not to purchase a book [must also be] an act of banning it, [which] no rational person would suggest. . . ." [Majority Opinion at 88.] As previously discussed, the dictionary defines banning as prohibiting, especially by legal means. By not stocking a book on a library shelf in the first place, a school board has prohibited no one from subsequently placing that book on a shelf. On the other hand, the School Board's action here prohibits all the district's schools from placing *Vamos a Cuba* on their library shelves.

not available in a school library).[10] *See also Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1247-49 (11th Cir. 2003) (per curiam) (calling school administrators' prohibition of the display of Confederate flags on school grounds "banning," even though the prohibition does not apply elsewhere); *Denno ex rel. Denno v. Sch. Bd of Volusia County*, 218 F.3d 1267, 1277-78 (11th Cir. 2000) (calling a prohibition of Confederate flags on school grounds, and not elsewhere, a "ban"). Similarly, other courts define the word "ban" the way that I have. *See, e.g., B. W.A. v. Farmington R-7 Sch. Dist.*, No. 07-3099, at *4, *8 (8th Cir. filed Jan. 30, 2009) (calling a school board's prohibition against depicting the Confederate flag on clothing in schools "banning"); *Barr v. Lafon*, 538 F.3d 554, 557-77 (6th Cir. 2008) (calling the prohibition against wearing clothing displaying the Confederate flag "banning," even though the students were not prohibited from wearing that clothing outside of school); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 248-63 (3d Cir. 2002) (calling the prohibition against wearing or possessing items depicting racial hatred a

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[10] The majority states that *Virgil* uses the word "ban" "only [when relying on] the opinion of a district court in Maine." [Majority Opinion at 90.] This is untrue. *Virgil* uses the word "ban" several times throughout the opinion, in various contexts, including to explain that the books at issue in the case were not "banned" from a school because they were available in the school library. *See Virgil*, 862 F.2d at 1525 (noting "that the disputed materials have not been banned from the school. The [disputed materials] are available in the school library."). While this may not be "the basis of the [*Virgil*] decision," it illustrates the court's consistent use of the word and its meaning.

"ban," even though those items were not prohibited outside of the schools); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022,1028 (9th Cir. 1998) (referring to the removal of books in schools as "banning"); *Pratt v. Ind. Sch. Dist. No. 831*, 670 F.2d 771, 773-80 (8th Cir. 1982) (referring to the "banning" of a film in schools based on their ideological content); *Cary v. Bd. of Educ.*, 598 F.2d 535, 536 (10th Cir. 1979) (calling books "banned" when they were removed from use in classes); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 533 (N.D. Tex. 2000) (referring to the removal of books in libraries as "banning"); *Borger v. Bisciglia*, 888 F. Supp. 97, 98, 100 (E.D. Wis. 1995) (referring to a film removed from the curriculum as "banned"); *Sheck v. Baileyville Sch. Committee*, 530 F. Supp. 679, 681-83 (D. Maine 1982) (referring to a book as "banned" when it was removed from a school library). Morever, in other contexts, we use the word "ban" as I use it here. *See, e.g., Searcey v. Harris*, 888 F.2d 1314, 1318, 1322 (11th Cir. 1989) (calling a school board's regulation prohibiting certain groups from presenting at career day "banning," even though they were not prohibited from presenting elsewhere). For example, we say that smoking has been "banned" on airplanes and in restaurants, even though people are free to have cigarettes and smoke in other venues. *See, e.g.*, FLA. STAT. ANN. § 386.206 (2008) (referring to "the smoking ban" in workplaces when people are allowed to have cigarettes and smoke in other venues); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 550 (5th Cir. 2008) (referring to "smoking

bans" even though smoking is permitted in some areas). In sum, our usage of the word "ban" does not require that people be forbidden from having the object entirely, as the majority contends.[11]

Furthermore, under the majority's definition—"where a government or its officials forbid or prohibit others from *having* a book," [Majority Opinion at 87], a school board could never ban a book. It has the authority to remove books only within its school system. If it does this, according to the majority, it has not banned the book, as it could only be "banned" if people cannot have the book altogether. Can it be that a school board can never take any action that would constitute banning? Can it be that "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, [or] if an all-white school board,

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[11] The majority rightly points out that the Supreme Court did not use the word "ban" to describe book removal in the *Pico* decision. [Majority Opinion at 91-93.] However, because I speak to the common usage of the word, both by the courts and in everyday use, the majority's point does not detract from the importance of the many other courts' use of the word and the way we all commonly use it. If we must look to the Supreme Court for guidance, we need not look any further than the *Tinker* decision. There, a school prohibited its students from wearing black armbands as a political protest. *Tinker*, 393 U.S. at 504, 89 S. Ct. at 735. The Court called the prohibition a "ban." *Id.* at 508, 509, 89 S. Ct at 737, 738. Even though the school did not prohibit the wearing of such armbands outside of the school, and indeed could not have done so, the Court nonetheless referred to the action as a "ban." Thus, the Supreme Court's use of the word does not comport with the majority's conception of a "ban" as when a "government or it's officials forbid[s] or prohibit[s] others from having an [object]" altogether. [Majority Opinion at 87.]

motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration," *Pico,* 457 U.S. at 870-71, 102 S. Ct. at 2810, this would not constitute banning because the schoolchildren are not also forbidden from owning these books at all? Such a definition limits the word's application to almost nothing.

Furthermore, it does not somehow lessen the School Board's "important, delicate, and highly discretionary functions" if the book remains available in other venues. The majority suggests that a school board's removal action is less repugnant to the First Amendment when it discusses all the ways one can still get his hands on a copy of the book, including online vendors, like Amazon.com. However, the requirements of the First Amendment are "[not] minimized by the availability of the disputed book in sources outside the school." *Minarcini v. Strongsville City Sch. Dist.,* 541 F.2d 577, 582 (6th Cir. 1976). *See also Denver Area Educ. Telecoms. Consortium v. FCC,* 518 U.S. 727, 809, 116 S. Ct. 2374, 2418 (1996) (Kennedy, J., concurring in part and dissenting in part) ("[T]he possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. . . . [F]ew of our First Amendment cases involve outright bans on speech."). "Restraint on protected speech generally cannot be justified by the fact that there may be other times, places or circumstances for such expression. The symbolic effect of removing the [book] . . . is more significant than the resulting limitation

of access to the story." *Pratt v. Ind. Sch. Dist. No. 831*, 670 F.2d 771, 779 (8th Cir. 1982) (citations omitted). As in *Pratt*, the Miami-Dade County School Board "has used its official power to perform an act clearly indicating that the ideas contained in the [book] are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious." *Id.* The majority's discussion of what constitutes "banning" chips away at the important limitations the First Amendment imposes on state-supported censorship of speech.

CONCLUSION

For decades, residents of Communist Cuba have emigrated to the United States to escape the repressive totalitarian regime of its dictator, to seek freedom, and to enjoy the privileges of United States citizenship. Prominent among those privileges is the freedom of speech, protected by the First Amendment to the United States Constitution. The banning of children's books from a public school library under circumstances such as these offends the First Amendment. As one Cuban American lamented, "I fear we may have become what we protest against—a totalitarian government." Matthew I. Pinzur, *Book on Cuba To Stay, For Now*, MIAMI HERALD, April 19, 2006, [Plaintiff's Exhibit 20].

"Don't like the book? Don't check it out. That's a choice unavailable to people in Cuba." Michael Putney, *Let's Close the Book on Attempts to Censor*, MIAMI HERALD, April 19, 2006, [Plaintiff's Exhibit 20.]

I respectfully dissent.

APPENDIX

(1) Cuba – "Cuba is a country in the Caribbean Sea, south of Florida. It is one big island with some smaller ones nearby. People in Cuba eat, work, and go to school like you do. Life in Cuba is also unique." (2) Land – "Cuba has flat plains that are used for farmland. There are also sandy beaches and coral reefs. The weather in Cuba is very warm. There are mountains in Cuba, too. The mountains are covered with forests." (3) Landmarks – "The capital of Cuba is Havana. The Capitol building in Havana looks like the United States Capitol building in Washington, D.C. Morro Castle is an old fort. It was built by people from Spain. It was used 400 years ago to protect Havana from pirates." (4) Homes – "Most Cubans live in cities. The cities are crowded, so many live in apartment buildings. There are some beautiful old buildings. There are new buildings, too. Most homes in the country are simple. Some are made of wood from palm trees. They have roofs of palm leaves or grasses." (5) Food – "White rice is the most common food in Cuba. Sometimes it is mixed with black beans. Chicken with rice is popular, too. Many kinds of fruits grow in Cuba. Bananas, pineapples, oranges, and mangoes are favorites. Yucca is a plant that people eat as a vegetable." (6) Clothes – "Cubans dress to keep cool in the hot weather. Many children wear shorts and T-shirts. For special festivals, men wear white pants and white shirts. Women wear colorful ruffled dresses." (7) Work – "Some

Cubans work in factories that make cigars or sugar. There are also factories where people make cloth, shoes, paper, and farm tools. In the country, there are large farms. The workers there grow sugarcane and tobacco. There are also farms for vegetables, such as lettuce, onions, and carrots." (8) Transportation – "There are not many cars in Cuba. In the cities, some people drive old cars from the United States. Most Cubans travel by bus. On country roads, people use animals to pull wagons. Animals are also used to help farmers in their fields." (9) Language – "Most people in Cuba speak Spanish. This is because Cuba was settled by people from Spain. Spanish uses some of the same letters as English. There are also some extra letters in the Spanish alphabet." (10) School – "Cuban children go to school between the ages of five and fourteen. They wear uniforms to school. There are different colored uniforms for different ages. In school, children learn math, reading, and history. All school children do some kind of work during their school day. Some children work in gardens. Older children may work in factories." (11) Free Time – "Baseball is Cuba's national sport. Cuba won the gold medal in baseball in the 1996 Olympic Games. Cuba's beaches are good for swimming and boating. People like to dive and fish. There are also rowboats and sailboat races. (12) Celebrations – "Cuba's biggest celebration is called Carnival. It is held on July 26. People dance and sing at this festival Some people who settled in Cuba were Roman Catholics. Other people who lived in Cuba were from Africa. So some Cuban celebrations mix

African and Catholic beliefs." (13) The Arts – "Cuban music mixes sounds from Africa and Spain. Musicians use guitars, drums, and gourds to make music and a beat. Dances from Cuba are popular around the world. In one valley in Cuba, there are large colorful paintings on some rocks. Inside the rocks are caves. The caves have paintings made by people who lived in Cuba about 1,000 years ago."

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-CIV-21577-GOLD/TURNOFF

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., GREATER MIAMI CHAPTER; MIAMI-DADE COUNTY STUDENT GOVERNMENT ASSOCIATION,
Plaintiffs,
v.
MIAMI-DADE COUNTY SCHOOL BOARD; RUDOLPH F. CREW, in his official capacity as Superintendent of Schools, Miami-Dade County Public Schools,
Defendants.
_____/

FILED
JUL 24 2006
S.D. OF FLA. MIAMI

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Plaintiffs' Emergency Motion for a Temporary Restraining Order which this Court converted to a Motion for Preliminary Injunction at a status conference held on June 27, 2006. Following the hearing on the Emergency Motion, I entered an Order establishing a briefing schedule for the parties to follow in submitting materials on the Motion for Preliminary Injunction to this Court **[DE 10]**.

On July 7, 2006, Plaintiffs filed a Supplemental Memorandum of Law and Statement of Facts in Support of Plaintiffs' Motion for a Preliminary Injunction **[DE 17 and 18]**. On July 11, 2006, pursuant to this Court's requests, Plaintiffs filed a supplemental memorandum of law on organizational standing **[DE 23]**. Also on July 11, 2006, Plaintiffs filed a supplemental memoranda on the elements of injunctive relief. **[DE 22]**.

On July 14, 2006, Defendants filed a Motion to Dismiss the Complaint **[DE 24]**, and a Response to Plaintiffs' Statement of the Case and Facts **[DE 25]**. On July 18, 2006, Defendants filed a Memorandum of Law in Response to Plaintiffs' Memorandum on Organizational Standing **[DE 29]**, and a Response to Plaintiffs' Supplemental Memorandum of Law on Certain Preliminary Injunction Elements **[DE 30]**.

On July 19, 2006, Plaintiffs filed a First Amended Complaint that adds Mark Balzli, individually and as next friend to his son Aidan Balzli, as Plaintiffs **[DE 39]**.[1] That same day, Plaintiffs also filed a Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction **[DE 38]**.

On July 17, 2006, I held an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction. Counsel for Plaintiffs presented testimony from Ronald Bilbao, Dr. Howard Simon, Mark Balzli, Pat Scales, Lucia M. Gonzalez, Lisandro

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[1] As explained in Section III, *infra*, Plaintiffs' First Amended Complaint is proper because Defendants have not yet filed a responsive pleading in this case. Fed.R.Civ.P. 15(a).

Perez, Maria Tavel-Visiedo, and Antoinette Dunbar. Plaintiffs also introduced into the record as evidence their Exhibits one through thirty-six, Exhibit thirty-nine, and forty-three through forty-four. Defendants presented testimony from Alberto Pimienta, Professor Juan Clark, Lydia M. Usatequi, M.D., and Maria Elena Sardinas. Defendants also introduced into the record as evidence their Exhibits A through D, with accompanying sub-exhibits, and Exhibits A through D as attached to the Affidavit of Maria Elena Sardina.

I. PARTIES

There are four named Plaintiffs in this case as stated in the First Amended Complaint for Declaratory and Injunctive Relief. The first is the American Civil Liberties Union of Florida, Inc., Greater Miami Chapter (the "ACLU"). The ACLU is the Florida affiliate of the American Civil Liberties Union, and defines itself as an organization "dedicated to advancing and preserving the constitutional protections found in the Bill of Rights, and in particular, the First Amendment." (Plaintiffs' Exhibit 26, Declaration of Dr. Howard L. Simon, ¶ 2). Its membership numbers approximately 3,500 people within the Miami-Dade County School District (the "School District"), a number of whom have children who attend school in Miami-Dade County and wish to retain the challenged book within the school libraries. (*Id.* at ¶ 8). The second Plaintiff in this case is the Miami-Dade County Student Government Association (the "Association"), a student-run organization representing the opinions and concerns of students attending Miami-Dade County Public

Schools. (Plaintiffs' Exhibit 24, Declaration of Ronald Bilbao, ¶ 3). Among other goals, the Association devotes resources to protecting and defending the First Amendment rights of its student body, including the right to "freely select a wide range of reading materials." (*Id.*). The Third Plaintiff is Mark Balzli. Mr. Balzli seeks relief both individually and as next friend of his son, Aidan Balzli, the fourth Plaintiff. Mr. Balzli is currently a member of the ACLU. (Plaintiffs' Exhibit 27, Declaration of Mark Balzli, "Balzli Declaration," ¶ 1). Mr. Balzli's six year-old son, Aidan, attends North Beach Elementary School, a school in the School District. (*Id.* at ¶ 2). Until recently, *¡Vamos a Cuba!* was part of the library collection at North Beach Elementary School. (*Id.* at ¶ 3). Mr. Balzli desires to check the book out to read it with his son. (*Id.*).[2]

There are two named Defendants in this lawsuit. The Miami-Dade County School Board (the "School Board") is responsible for establishing, organizing, and operating public schools within Miami-Dade County. (Amend. Compl., ¶ 8).[3] The School Board operates within the Miami-Dade County School District (the "School District"), a geographical region that embodies all of Miami-Dade County. Defendant Rudolph F. Crew is the Superintendent of Schools for Miami-Dade County

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[2] There was an issue of fact at the preliminary injunction hearing as to whether Mr. Balzli and his son had seen *¡Vamos a Cuba!* at the North Beach Elementary School library. I hereby credit Mr. Balzli's testimony that he had see the book.

[3] Although I glean these facts from the Amended Complaint, they do not appear to be in dispute.

(the "Superintendent"). (*Id.* at ¶ 9). He is named as a Defendant in this lawsuit because it is his responsibility to carry out School Board orders, including the order that is the subject of this case. (*Id.*).

Plaintiffs seek injunctive relief to enjoin Defendants from executing an order entered by the School Board authorizing the removal of a series of books from school libraries within the School District. I will now turn to the history that preceded the filing of this case.

II. FACTS

A. The Cuba Books and the Complaint

On April 4, 2006, a parent of a student attending Marjory Stoneman Douglas Elementary School filed a formal complaint pursuant to School Board Rule 6Gx13-*6A-1.26* (the "School Board Rule") requesting that *¡Vamos a Cuba!* (the "Book," or together with its English counterpart, *A Visit to Cuba,* the "Cuba Books") be removed from the "total school environment" at Marjory Stoneman Douglas Elementary School. (Plaintiffs' Exhibit 32, Citizen's Request for Reconsideration of Media). In response to the complaint form question, "To what do you object? *(Please be specific; cite pages or sections.),*" the parent responded: "The contents and photographs of the book." (*Id.*). In response to the complaint form question, "Why do you object to this material?", the parent responded: "As a former political prisoner from Cuba, I find the material to be untruthful. It

portrays a life in Cuba that does not exist." (*Id.*).[4]

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[4] The Cuba Books' content explores Cuba, Land, Landmarks, Homes, Food, Clothes, Work, Transportation, Language, School, Free Time, Celebrations, and the Arts, as follows: (1) Cuba-"Cuba is a country in the Caribbean Sea, south of Florida. It is one big island with some smaller ones nearby. People in Cuba eat, work, and go to school like you do. Life in Cuba is also unique." (2) Land-"Cuba has flat plains that are used for farmland. There are also sandy beaches and coral reefs. The weather in Cuba is very warm. There are mountains in Cuba, too. The mountains are covered with forests." (3) Landmarks-"The capital of Cuba is Havana. The Capitol building in Havana looks like the United States Capitol building in Washington, D.C. Morrow Castle is an old fort. It was built by people from Spain. It was used 400 years ago to protect Havana from pirates." (4) Homes-"Most Cubans live in cities. The cities are crowded, so many live in apartment buildings. There are some beautiful old buildings. There are new buildings, too. Most homes in the country are simple. Some are made of wood from palm trees. They have roofs of palm leaves or grasses." (5) Food-"White rice is the most common food in Cuba. Sometimes it is mixed with black beans. Chicken with rice is popular, too. Many kinds of fruits grow in Cuba. Bananas, pineapples, oranges, and mangoes are favorites. Yucca is a plant that people eat as a vegetable." (6) Clothes-"Cubans dress to keep cool in the hot weather. Many children wear shorts and T-shirts. For special festivals, men wear white pants and white shirts. Women wear colorful ruffled dresses." (7) Work-"Some Cubans work in factories that make cigars or sugar. There are also factories where people make cloth, shoes, paper, and farm tools. In the country, there are large farms. The workers there grow sugarcane and tobacco. There are also farms for vegetables, such as lettuce, onions, and carrots." (8) Transportation-"There are not many cars in Cuba. In the cities, some people drive old cars from the United States. Most Cubans travel by bus. On country roads, people use animals to pull wagons. Animals are also used to help farmers in their fields." (9) Language-"Most people in Cuba speak Spanish. This is because Cuba was settled by people from Spain. Spanish uses some of the same letters as

The School Board Rule prescribes a list of 15 criteria for teachers, library media specialists, and administrators to apply in evaluating library materials. (Plaintiffs' Exhibit 11). Some of those criteria include educational significance, appropriateness (to age, maturity, interest and learning levels), and accuracy. (*Id.*). These guidelines help library specialists to develop a "comprehensive collection" of materials "in all areas of knowledge." (*Id.*).

The School Board Rule also prescribes certain procedures to be followed whenever a citizen

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English. There are also some extra letters in the Spanish alphabet." (10) School-"Cuban children go to school between the ages of five and fourteen. They wear uniforms to school. There are different colored uniforms for different ages. In school, children learn math, reading, and history. All school children do some kind of work during their school day. Some children work in gardens. Older children may work in factories." (11) Free Time-"Baseball is Cuba's national sport. Cuba won the gold medal in baseball in the 1996 Olympic Games. Cuba's beaches are good for swimming and boating. People like to dive and fish. There are also rowboats and sailboat races." (12) Celebrations-"Cuba's biggest celebration is called Carnival. It is held on July 26. People dance and sing at this festival. Some people who settled in Cuba were Roman Catholics. Other people who lived in Cuba were from Africa. So some Cuban celebrations mix African and Catholic beliefs." (13) The Arts-"Cuban music mixes sounds from Africa and Spain. Musicians use guitars, drums, and gourds to make music and a beat. Dances from Cuba are popular around the world. In one valley in Cuba, there are large, colorful paintings on some rocks. Inside the rocks are caves. The caves have paintings made by people who lived in Cuba about 1,000 years ago." The large-prints texts are accompanied by color photographs. A short list of facts, translations and a bibliography is appended.

complains about a library book. (*Id.*). Specifically, the School Board Rule provides an initial, school level review of the complaint, followed by a district level review, and finally, a review before the School Board itself. (*Id.*).

The books about which Mr. Amador complained, the Cuba Books, are picture books in a larger series of books called the "A Visit To" series published by Heinemann Library (the "Series"). (Plaintiffs' Exhibit 35). The "A Visit To" series targets readers between the ages of 4 to 8 years old, and are written to provide basic information about what life is like for a child in twenty countries. The English language series—of which A Visit to Cuba is part—covers twenty countries: Australia, Brazil, Cambodia, China, Colombia, Costa Rica, Cuba, Egypt, France, Germany, Greece, India, Ireland, Israel, Italy, Japan, Mexico, Puerto Rico, The United Kingdom, and Vietnam. (*Id.*).[5] The Spanish language series, of which *¡Vamos a Cuba!* is part, covers four countries: Columbia, Cuba, Costa Rica and Puerto Rico.(*Id.*).

According to Plaintiffs' Exhibit 17, there are currently 49 copies of the book *¡Vamos a Cuba!*, or its English counterpart, in 33 public elementary and middle schools in the School District.[6] Five of those

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[5] Pursuant to this Court's request, Defendants filed copies of all twenty books, and I hereby refer to the collection of books as Court's Exhibit 1.

[6] One hundred and fifty-nine copies of the Cuba Books are currently found in school districts across the state of Florida. (Plaintiffs' Exhibit 18, Notes and Reviews for the book *¡Vamos a Cuba!*).

schools are middle schools. (*Id.*). Marjory Stoneman Douglas Elementary, where Mr. Amador's son attended school, had purchased three copies of the Cuba Books. (*Id.*). Copies of the Cuba Books were obtained by the schools at different times between the years 2001 and 2006. (*Id.*).[7] According to the undisputed testimony at the evidentiary hearing, students attending any of those schools may obtain a copy of either book at their leisure, and students and their parents at any other public school within the School District may check out the book through the inter-library system loan program. Moreover, parents may visit school libraries with their children both before and after school hours at any time throughout the school year to locate and check-out books for recreational reading.

B. Review Process

1. School Level Review

In response to Mr. Amador's complaint, the School Board convened a School Materials Review Committee ("SMRC") to review the matter. (Plaintiffs' Exhibit 10, Memo dated April 21, 2006 to Dr. Manuel C. Barreiro, Principal of Marjory Stoneman Douglas Elementary from Mrs. Janet S. Hupp, Regional Superintendent Regional Center V Operations). Represented on the SMRC were eight individuals, including elementary school educators,

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[7] At the evidentiary hearing, Plaintiffs submitted Exhibit 44 identifying with more particularity the location of copies of the Cuba Books in the Miami-Dade Public School System. From this revised list, there are even copies of the Cuba Books in several senior high schools.

librarians, administrators, a representative of the parent teacher student group and the designee of the Regional Center V Superintendent. (*Id.*). The SMRC met on April 17, 2006 and reviewed Mr. Amador's complaint, the School Board Rule, (particularly the 15 evaluative criteria set forth in Section IV of the Rule), a rubric, or worksheet, to aid in their assessment of the 15 criteria, and the challenged Book.[8](*Id.*).

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[8] The SMRC considered a number of reviews on the Cuba Books. Below is a list of the review titles and their comments on the Cuba Books:

- *Criticas* (July 1, 2004) (Monthly online magazine with reviews of Spanish language books): PS-GR 3—Each of these four large-print, easy-to-read books on Latin American countries offers basic facts about each country's food, clothing, work, languages, points of interest, festivals, and arts. All contain a page of important facts and a list of Spanish words that are peculiar to the region, along with their English meanings. A good beginning reader choice for school and public libraries, and for childcare centers with large Latino populations. Copyright 2004 Reed Business Information.
- *School Library Journal* (April 2001) (Journal providing reviews of children/young adult literature): Gr 2-4—Colorful photographs and brief texts fill the pages of these introductory titles. The table of contents is essentially identical for both: land, landmarks, homes, food, clothes, work, transportation, language, school, free time, celebrations, and the arts. Each topic is covered in a two-page spread with one large photograph and three or four lines of simple text per page. (For example, "Cruise ships stop at San Juan. They bring tourists to the islands," is followed by four more sentences about transportation in Puerto Rico).
  Words in bold are explained in the glossary. A "Fact File" is found at the end of each volume along with

identical lists of "Words You Can Learn," in Spanish. These books are similar in scope and reading level to the "Take a Trip" series (Watts), but provide fewer details. While the information is very basic and succeeds in giving only a glimpse at life in these countries, the books may be appropriate for collections needing easy titles on different nations.—Marilyn Long Graham, Lee county Library System, Estero, FL.

- *Booklist* (October 2001) (review journal-American Library Association): Gr. 2-4, younger for reading aloud. These books in the Vamos a series introduce the land, culture, and people of four Spanish-speaking countries—Puerto Rico, Colombia, Costa Rica, and Cuba. The texts are repetitive and somewhat dry, but they are easy to read, filled with facts, and accompanied by color illustrations and simple maps. Unfortunately, the nouns in the well-conceived glossaries are listed without the definite articles that accompany nouns in Spanish. Language learners won't, for example, know that capital is a feminine noun and aji is masculine. Isabel Schon is the director of the Barahona Center for the Study of Books in Spanish for Children and Adolescents, California State University, San Marcos.
- *Horn Book* (Fall, 2001) (Journal providing reviews of children/young adult literature): These books offer superficial introductions to geography, people, customs, language, and daily life. The formulaic texts in these Spanish editions are almost identical for Cuba and Puerto Rico, and none contains more than the barest amount of information. The large-print texts are accompanied by color photos of varying quality and relevance. A short list of facts is appended. Also available in English.
- *Publishers Weekly* (March 11, 2001) (Magazine covering publishing industry): Gr 2-4—These informative and colorful books can be placed either in a reference collection or in a circulating collection. The title pages feature a world map with the respective country highlighted, and a table of contents outlines the broad subject categories covered (e.g., points of interest,

On April 17, 2006 each member of the SMRC completed a review sheet for the Book that provided space for commentary on each of the 15 evaluative criteria contained in the School Board Rule. (*Id.*). All eight SMRC members found the Book educationally significant and developmentally appropriate, and seven SMRC members found the book to meet the accuracy criteria. (*Id.*). Indeed, the comments of the SMRC were almost uniformly favorable on all 15 criteria. (*Id.*). Moreover, six of the SMRC members expressly noted on their worksheets that they found the book to be apolitical, variously describing the Book as "scrupulously apolitical," having "no political slant," and no "political implications."[9] (*Id.*).

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homes, food, clothing, work, transportation, language, education, entertainment, celebrations, and the arts). Information is offered in simple statements without commentary, the attractive layout features full-color photographs of children in many different scenes, and selected words are bolded within the text and later explained in the glossary. Appended are key facts about the country, an index, a bibliography, and a short list of words and their many variants. These books will be invaluable for homework assignments and will appeal to readers who are curious about life in other countries. Copyright 2001 Cahners Business Information.

(Plaintiffs' Exhibit 18).

[9] Several members of the SMRC made personal comments on their ballots: (1) "I feel the book is apolitical, factually accurate and developmentally appropriate for elementary school children." (2) "I have read the book, 'A Visit to Cuba' and found the book to be scrupulously apolitical." (3) "This committee member finds this book appropriate for the age group. No political slant was detected; however author could have better written and researched the topic." (4) "No political slant was noted. Author could have better researched her topic." (5) "I feel

Following their discussion, the SMRC voted by secret ballot on the question of whether to retain or remove the Book from the library. By a vote of 7 to 1, the members of the SRMC voted to retain the Book.

2. School Board Intervention

Before the question was considered at the district level, a School Board member proposed that the School Board immediately remove *¡Vamos a Cuba!* from the libraries without waiting for the administrative process concerning removal of the book to run its course. That School Board member, Frank J. Bolaños, added the following item to the School Board's April 18, 2006 agenda: **PROTECTING OUR CHILDREN FROM THE HURTFUL & INSULTING DISTORTIONS OF THE BOOK " VAMOS A CUBA" BY REMOVING THESE BOOKS FROM ALL OF OUR PUBLIC SCHOOL LIBRARIES.** Mr. Bolaños described *¡Vamos a Cuba!* as "hurtful and insulting to both our Cuban-American community and those Cubans still living on the island under oppressive conditions." (Plaintiffs' Exhibit 19, Memo to School Board Members dated April 18, 2006). Mr. Bolaños then described a number of the book's passages as "distortions," followed by his comments, labeled "reality." (*Id.*). The following is a list of those

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the book is developmentally appropriate for Elementary school children. I don't feel that it has political implications." (6) "This book explains the information in a factual format without direct political implications. It is developmentally appropriate for the age level it was written for. The material is valuable to the library media collection and could be supplemented and explained by mature classroom instruction."

passages and his comments:

- **Book's distortion:** "The people of Cuba eat, work and study like you," page 5.

  Reality: Nothing could be further from the truth. The people of Cuba survive without civil liberties and due process under the law and receive 10 to 20 year prison sentences for simply writing a document or voicing an opinion contrary to the party line. People are told where to work. They lose their job if they do not follow the dictates of the communist party. Children are indoctrinated and forced to chant Castro's greatness in class.

- **Book's distortion:** "White rice is the most common food in Cuba. Black beans are eaten. Arroz con Pollo is another favorite dish," page 12.

  Reality: Food is rationed; people stand in line for hours to ask for their measly ration only to be told they ran out. Children stop receiving their milk ration at age six.

- **Book's distortion:** "The major celebration in Cuba is 'Carnival.' It is celebrated on July 26th,"

page 26.

Reality: The annual commemoration of July 26th is the symbolic observation of the rise to power of Castro's communist, totalitarian regime. It is a day of mourning for most Cubans. Cubans celebrate the 20th of May and the 28th of January, to celebrate their independence from Spain and the birth of Jose Marti, Cuba's greatest national hero.

- **Book's distortion:** "The celebrations in Cuba are a mix of African and Catholic roots," page 27.

  Reality: Historically, Castro's regime has prohibited or chastised those that engage in religious practices, including the Catholic Church and other organized forms of religion. Religious leaders, including Jehovah's Witnesses have been imprisoned. A famous cry while facing Castro's firing squad was "Viva Cristo el Rey" (long live Christ the King).

The ensuing School Board testimony and debate on April 18, 2006 was characterized by repeated references to political issues and viewpoints

and was sharply critical of the book for omitting negative political information about the Castro regime from its contents. For example, one School Board Member Perez made the point that the book was unacceptable in the same way that libraries do not allow books about pornography, "devil worship and other offensive things like that." (Plaintiffs' Exhibit 33, Transcript of School Board Meeting on April 18, 2006 ("April Transcript"), 60:9-60:12). She went on to compare the *¡Vamos a Cuba!* to books featuring "Hitler Youth, or Nazism, or the KKK Youth." (April Transcript, 60:13-60:17). She opposed the book because she believes that "it is especially damaging to the sensibilities of this community." (April Transcript, 62:7-62:9). Likewise, School Board Member Logan reported that she wanted the book removed "as somebody who suffered [in Cuba] firsthand." (April Transcript, 69:20-69:22). School Board Member Bolaños, in favoring an immediate ban on *¡Vamos a Cuba!*, criticized the review process as one that would not "satisfy the segment of our community that is outraged, that feels discriminated against by this book." (April Transcript, 73:3-73:11). He complained that the process required someone to complain at each of the more than 30 schools bearing the book. (April Transcript 73:9-73:11). School Board Member Tabares Hantman also prefaced her opinion on the agenda item with the comments, "I am a Cuban American. I was born in Cuba. And as the other board members said, my family, and my father and mother lost everything that they had worked for." (April Transcript, 80:13-80:22).

Following the debate, the School Board's

attorney discussed some of the constitutional concerns surrounding the proposed action. She specifically informed the School Board that there was a governing rule that provided due process and procedures for removing a book from the school library. (April Transcript, 56:2-56:5). She warned that "the ultimate decision of this board, would only be appropriate after following all levels of due process procedures in our book removal process." (April Transcript, 56:14-56:18). Moreover, she urged the School Board to be "mindful of it's own board rule and follow that board rule in this issue to avoid constitutional challenges." (April Transcript, 56:19-56:24). Her colleague expanded on these ideas somewhat, reminding the School Board that what is at issue is a "constitutional due process procedure" that protects parents and their First Amendment rights. (April Transcript, 58:3-58:9). In closing, the School Board's attorney stated that there was no provision in the School Board's rules to allow the Board to "act independently and remove a book that it finds objectionable. Rather, it must follow the process that is in that rule in order to achieve that purpose." (April Transcript, 58:16-58:22).

At the close of debate, the School Board voted 6 votes to 3 to allow the administrative process surrounding the retention of the Book to proceed to its eventual conclusion. (April Transcript, 89:22-90:5).

3. District Level Review

On April 21, 2006, the principal of Marjory Stoneman Douglas Elementary School informed the Regional Superintendent and Mr. Amador of the

SRMC's decision. Mr. Amador, in turn, exercised his right to file a formal appeal with the School District pursuant to another section of the School Board Rule.

The Superintendent then convened a 17-member ad hoc District Materials Review Commission ("DMRC") charged with considering Mr. Amador's appeal of the SRMC's decision. The Superintendent appointed a wide variety of professionals and lay people to the DMRC, including: the Regional Center Superintendent; the Principal of Lakeview Elementary School; the Principal of Coral Way K-8 Center; the Administrative Director of Instructional Technology, Instructional Materials, and Library Media Services; the Directors of Division of Social Sciences; the Instructional Supervisor of Language Arts; the Instructional Supervisor of Library and Media Services; a Reading Coach from Martin Luther King Elementary School; the Library Media Specialist from Phillis Wheatley Elementary School; the Library Media Specialist from Key Biscayne K-8 Center, a student from South Miami Senior High School; a designee from United Teachers of Dade; the President of the Dade County Council of Parent-Teacher/Parent-Teacher-Student Associations; a representative of the Florida House of Representatives; and the President of the Spanish American League Against Discrimination.[10] (Plaintiffs' Exhibit 7, Memo from Rudolph F. Crew,

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[10] The Superintendent originally appointed Rudy Pittaluga, Sr., who was president of SALAD to the DMRC. However, Dr. Lydia Usategui actually served on the DMRC as the group's representative.

Superintendent of Schools to the Honorable Chair and Members of The School Board of Miami-Dade County, Florida).

On April 28, 2006, JulieAnn Rico Allison, the School Board Attorney, sent a memorandum to the School Board concerning the Cuba Books and the potential to remove those books from libraries in the School District (the "Allison April Memo"). (Plaintiffs' Exhibit 12). The memo appears intended to keep the School Board apprised of activities concerning the status of the Cuba Books' removal. Within the Allison April Memo are details concerning the composition of the DMRC, the DMRC's process for reviewing and making recommendations concerning the Cuba Books (including the 15 evaluative criteria poised for consideration), and the process for an appeal of that decision. (*Id.*).

On May 22, 2006, Superintendent Crew sent a Memo to the Deputy Superintendent Curriculum, Instruction and School Improvement in which he laid out a number of options for the DMRC to consider. (Plaintiffs' Exhibit 5, p. 14). His comments were the following:

> • Other materials that present a more accurate and complete description of life in Cuba will be identified immediately and, if not already available, be made available immediately in library media centers with *Vamos a Cuba/A Visit to Cuba* in their collections. These materials would include *Cuba for Kids*, the

book mentioned at the most recent Board meeting. The District already owns many more copies of this book than *Vamos a Cuba,* although it is not present in all the libraries that own *Vamos a Cuba.*

- A bookplate will be placed in the inside cover of the books *Vamos a Cuba* and *A Visit to Cuba* that explains to students and parents that statements in those books are incomplete or inaccurate in many cases and that directs them by title to the alternate materials that have been identified as more factually correct and complete descriptions of life in Cuba and are available in their school's library media center (see attached language).[11]

- The books *Vamos a Cuba/A Visit*

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[11] The attachment reads as follows:

ATTENTION STUDENTS AND PARENTS. This book was purchased by your school as part of a series of books on many foreign countries. Some of the information provided in this book about life in Cuba under that nation's communist dictatorship is incorrect or incomplete enough to be inaccurate. For an accurate depiction of life in Cuba, Miami-Dade County Public Schools recommends the following books that can be found in this school's library. *Cuba for Kids* by Ismael Roque-Velasco.

> *to Cuba* will be checked out only with parental consent.

As it turned out, the DMRC did not adopt any of the suggested options, and disagreed with the Superintendent's initial observations about inaccuracies and omissions.

The DMRC met on May 22, 2006 and June 5, 2006 to consider the merits of Mr. Amador's appeal. (Plaintiffs' Exhibit 5, Memo dated June 7, 2006 from Antoinette Dunbar, Deputy Superintendent Curriculum, Instruction, and School Improvement to Dr. Rudolph F. Crew, Superintendent of Schools (the "June 7 Dunbar Memo")). Each of the DMRC members received a packet of materials that included Mr. Amador's complaint, copies of both *¡Vamos a Cuba!* and *A Visit to Cuba,* and the School Board Rule (including the criteria for evaluating the Cuba Books). At the first meeting, Chairperson Antoinette Dunbar, Deputy Superintendent, Curriculum, Instruction, and School Improvement, asked the DMRC members to vote on which of the evaluative criteria they believed were most important to consider in order to streamline the process. (Plaintiffs' Exhibit 7, DMRC May 22, 2006 Minutes). The result of the vote was that the DMRC decided to focus on the criteria of Educational Significance, Appropriateness and Accuracy. (*Id.*).

At its meeting on May 22, 2006, the DMRC discussed both the Cuba Books' educational significance at length. (Supplemental Declaration of Ronald Bilbao in Support of Plaintiffs' Motion for A Preliminary Injunction (the "Supplemental Bilbao Declaration"), ¶ 9). The members of the DMRC broke

into smaller groups to review other books from the "A Visit To" series without comparing them to the Cuba Books. (DMRC May 22, 2006 Minutes). The DMRC then discussed the books reviewed, with various participants noting such things as the fact that the books have a formulaic format and that there are books about other communist countries (i.e., China and Vietnam). (*Id.*). One participant stated that the titles of the Cuba Books are "misinterpretations" because they mistakenly imply that one can visit Cuba freely. (*Id.*). Another participant observed that *A Visit to Cuba* has less specific information that does *A Visit to Vietnam*. (*Id.*). Another pointed out that there is a mistake regarding page 29 of the Cuba Books in that they refer to a cave painting as erroneously created 1,000 years ago. (*Id.*).

The DMRC eventually determined that the Cuba Books met the educational significance criteria of the School Board Rule, noting in the process that the books were supplemental and not mandatory, and that they were valuable to an individual course of study. (Supplemental Bilbao Declaration, ¶ 9). Although the Chairperson distributed copies of other books in the Series, those books were not reviewed under the evaluative criteria. (*Id.* at ¶ 6).

At the beginning of the DMRC's second meeting on June 5, 2006, one of the participants distributed a document titled "A Content Analysis of the Book Vamos A Cuba" by Juan Clark (the "Article"). (Id. at ¶ 12; Plaintiffs' Exhibit 21). The Article contains the following observations, among others:

- **The people in Cuba *eat, work,***

and *study* like you. But in Cuba there are unique things.

It is ignored that there is a rationing system for food in place since 1962, causing a great amount of anguish in all households. There is very little private work since the system attempts to keep a tight control on this economic dimension, to the point of making it a crime to exercise private initiative or to have private practice of a profession. Practically everyone must work for the government. Education is permeated by political control and indoctrination, as well as by discrimination, but with great privilege for children of the elite.

- **In the countryside, houses are simple. They are built with palm trunks. The roofs are made of palm leafs or straw.**

  It should have been said that many houses are built that way, but certainly not the majority of those in the countryside. Furthermore, the described houses (bohios) are not built with the trunk of the royal palm since that would destroy the palm, but with (the yagua*), the upper part*

attached to the trunk of the long leaf (the penca*). No straw is used in the roof, only the leafs.*

- **...All students do some work during the school day. Some work in the garden. The older ones working factories.**

  This is absolutely wrong. From the 6th grade on, students go to the countryside for a period of 45 days to do unpaid agricultural work, fulltime. Nowadays, from the senior high level, all must go to the countryside to do unpaid agricultural work, on a permanent basis, alternating half day in the fields and half in the classroom. Needless to say that learning suffers. In addition to great implications of the forced separation from the families at that age and the undesirable environmental conditions. High pregnancy rates in adolescence are a bi-product of this system.

- **In a Cuban valley, there are big colored paintings, on the rocks and caves. These were painted by Cuba's inhabitants about a thousand years ago.**

  This is probably the worst factual error in the book. This paint was

> *made in the 1960s; it is advertised that way in Cuban tourist information and in the Internet, yet, unbelievably, the writer introduces this gross misinformation that really has no excuse. This huge painting, called* Mural de la Prehistoria *is located in the Valle de Viñales in Pinar del Rio province.*

Later in the meeting, a representative of SALAD distributed a pamphlet featuring a picture of Adolf Hitler on the cover. (Supplemental Bilbao Declaration, ¶ 15). Throughout the meeting members of the public make interrupted the DMRC's discussions, often whispering the word "communist" whenever DMRC members spoke favorably about the Cuba Books. (*Id.* at ¶¶ 11, 13).

The DMRC devoted its attention to the other prioritized evaluative criteria, appropriateness and accuracy. (Plaintiffs' Exhibit 36, DMRC June 5, 2006 Minutes). It also considered the Book in light of the criteria of scope, special features, translation integrity, and aesthetic quality. (Bilbao Declaration, ¶ 16). Another consideration was "missing facts," and whether those facts were meant to be included in a book for young children. (DMRC June 5, 2006 Minutes). Towards the end of the meeting, Representative Rivera resigned from his participation on the DMRC, noting that it had been "infiltrated by the Superintendent." (*Id.* at ¶ 18; June 7 Dunbar Memo).

Chairperson Dunbar then explained to the

remaining members of the DMRC that there were four possible actions they could vote on with respect to the handling of the Cuba Books. They were: (1) keep the Cuba Books in the library; (2) leave the Cuba Books in the library but allow the students to use alternate materials; (3) limit the use of the Cuba Books; or (4) remove the Cuba Books from the total school environment. (*Id.* at ¶ 19; June 7 Dunbar Memo). The DMRC voted fifteen to one to retain the Cuba Books in the libraries with no restrictions. (Plaintiffs' Exhibit 5).

4. Superintendent's Review

On June 7, 2006, the Superintendent affirmed the DMRC's recommendation. (*Id.*; Plaintiffs' Exhibit 4, Memo dated June 7, 2006 from Rudolph F. Crew, Superintendent of Schools to Honorable Chair and Members of the School Board of Miami-Dade County, Florida). Specifically, the Superintendent stated that the DMRC had forwarded its recommendation to him, and "[a]fter reviewing that information, I have decided to affirm the recommendation." (*Id.*). The Superintendent then notified Mr. Amador of his decision in a letter dated June 8, 2006, wherein he also advised Mr. Amador of his right to appeal his decision to the School Board. (Plaintiffs' Exhibit 3, Letter dated June 8, 2006 from Rudolph F. Crew, Superintendent of Schools to Mr. Juan Amador). On June 8, 2006, Mr. Amador filed a formal appeal of the DMRC's decision with the School Board, requesting that it decide his appeal at the June 14, 2006 School Board meeting. (*Id.*).

5. School Board Level Review

On June 7, 2006, the School Board's attorney issued a Supplemental Opinion on the Book Rivera and Removal Process Under Board Rule 6Gx13-*6A-1.26* (the "Allison June Memo"). (Plaintiffs' Exhibit 12). The Allison June Memo details the remaining steps in the appellate process, the options available to the School Board in terms of providing access to the Cuba Books, the legal standards that apply to challenges to school library books, and the legal consequences should the School Board reject the DMRC's decision. (*Id.*). The School Board's attorney advises, in pertinent part:

> The DMRC merely reviewed the decision of the SMRC and the complaint of a parent from one school requesting that the book be removed from his child's school library. There is no provision in the Rule for a district-wide removal of a school library book stemming from a DMRC review. Although the Rule does not prohibit the Board from making a decision affecting the District as a whole, such District-wide impact would be more susceptible to legal challenge because the Rule apparently contemplates independent school-by-school decisions regarding books....
>
> [I]t is important for the Board to carefully and thoughtfully consider the recommendations of the DMRC and Superintendent. The Board should be careful to state its legitimate,

> constitutionally-sound reasons for its decision and the reasons for deviation from the DMRC and Superintendent's recommendations .... The Board's decision should be memorialized in a formal order, which would be rendered by filing with the Clerk of the School Board. The order should contain the Board's findings and conclusions showing the rationale for the Board's decision....
>
> [I]t is our opinion that deviation from the DMRC's decision, especially in light of the extensive analysis and deliberations by the DMRC, would most likely subject such a decision by the Board to a legal challenge.... [I]t is exceedingly important that the Board identify with specificity the legal grounds for any Board decision, particularly any decision that deviates from the DMRC's recommendations. Moreover, it is our opinion that even a well reasoned decision by the Board that deviates from DMRC's recommendations will expose the Board to liability.

(Plaintiffs' Exhibit 12). The matter became an item on the School Board's agenda, and the School Board was asked to either affirm the Superintendent's recommendation as its Final Order, reject the recommendation and make specific findings and conclusions in support of the decision.

On June 7, 2006, in preparation for the School Board's upcoming meeting, Mr. Bolaños submitted another resolution for the School Board to consider, entitled:

> **TEACHING OUR CHILDREN THE TRUTH ABOUT CUBA BY REMOVING THE BOOK " VAMOS A CUBA" FROM ALL OF OUR PUBLIC SCHOOL LIBRARIES & REPLACING THEM WITH HISTORICALLY ACCURATE & EDUCATIONALLY RELEVANT BOOKS**

The proposal states that "[t]his book and its errors of commission and omission should not remain in the hands and minds of innocent five to nine year old children."

At its meeting on June 14, 2006 the School Board considered Mr. Amador's appeal. Mr. Amador addressed the School Board, noting that he did not seek to censor anything, but rather to "assert the right that we have as parents to oversee the education of our children." (Plaintiffs' Exhibit 34, June 14, 2006 Transcript, 6:4-6:8). Following their discussion, the School Board rejected the Superintendent's decision that affirmed the two previous review committees. The School Board's Final Order of the School Board of Miami-Dade County, Florida (the "Final Order") states in its entirety:

> Upon a review of the complete Record of the proceedings below, including the

> transcript of the proceedings on Board Agenda Item G-3 (incorporated herein by reference and attached hereto, and made a part of this Final Order), the Superintendent's recommendation sustaining the District Materials Review Committee's decision is hereby rejected. The foregoing is based upon the findings reflected by the record of these proceedings, and more specifically the finding that the book is inaccurate and contains several omissions. It is further ordered that this book and the series it is part of, be replaced, throughout the school district, with a more accurate set of books that is more representative of actual life in these countries. (Plaintiffs' Exhibit 15).

Through its Final Order, the School Board established two mandates. First, the Final Order commands the removal of the Cuba Books from all school libraries in the School District. Second, the Final Order requires the removal of all other books in the Series from all school libraries in the School District.

The undisputed testimony at the evidentiary hearing was that the Cuba Books, together with all the remaining books in the Series have been removed from the shelves of all libraries within the School District and are currently stored in a warehouse facility. The complete list of books removed is set forth in Plaintiffs' Exhibit 44. At the time of the preliminary injunction hearing, public school

students living in Miami-Dade County were unable to access the Cuba Books or the remaining books in the series in their school libraries and would not be able to do so when the Miami-Dade Country Schools open on August 14, 2006.

C. Commentary from School Board Members

The School Board's June 14, 2006 decision contains no specific findings regarding any of the books ordered removed. Therefore, I turn to the transcript from the meeting to elicit commentary by School Board members on the subject.

Six School Board members voted to remove the Cuba Books and the Series to which they belong from the libraries within the School District. Below are a number of comments from the members of the School Board who voted on the issue of removal.

1. Chairman Augustin J. Barrera

In beginning the deliberations on June 14, 2006, School Board Chairman Barrera stated that Mr. Amador filed the complaint about the Book "because he feels that this is offensive, not only to him, but to the Cuban community." (Transcript from School Board Meeting, Book Challenge, June 14, 2006 ("June Transcript"), 9:15-9:18). Later, Chairman Barrera described the matter before the School Board as involving "issues of inaccuracies, it's issues of omissions, because sometimes the words that are not said are more powerful that those words which are said, and sometimes there's generalities, which how this book is portrayed." (June Transcript, 9:20-9:24). Chairman Barrera continued:

> There is a couple of images that, you know, to the average person it's just kids in school uniforms, but to me as a Cuban, and to the Cuban American community, we see kids in uniforms and they're called the Pioneers, and that represents what is there today, which is a dictatorship of Fidel Castro. So, yes, we are offended. Even though it doesn't say anything but the cover of that book is offensive to us as a community.
>
> It also talks about July 26th celebrating Carnival. Well, my understanding is they were celebrating Carnival before on July 26th, but July 26 also has another representation to us that some people may not be aware of. That is the day that Fidel Castro's revolution started so, to us, that day has a significance that that book fails to mention.

(June Transcript, 11:9-12:1). Chairman Barrera also remarked that "it's in the lack of information that I think we as the Cuban community are offended." (June Transcript, 13:13-13:14). He also noted that during the course of things, he and fellow Board member Ana Rivas Logan ("Logan") had been referred to as "communists."(June Transcript, 14:16-14:22).

2. Ana Rivas Logan

Board Member Logan began her comments by noting that she also came from "an oppressed

regime." (June Transcript, 15:20-15:21). She noted that "from the very first day that [she] reviewed the book found the book extremely offensive, inaccurate, full of omissions." (June Transcript, 17:12-17:15). In the end, she reached the conclusion that the entire Series should be replaced with "a new and updated series,..." (June Transcript, 18:19-18:25).

3. Frank Bolaños

At the School Board meeting, Mr. Bolaños noted that the Cuba Books' "acts of commission, and omission does not teach our children the truth about Cuba," and therefore should be removed from the School District's libraries. (June Transcript, 20:10-20:14).

4. Tabares Hantman

Board Member Tabares Hantman opened with a statement to stand firmly in **her** "commitment to stand with the Cuban American community, which I am a very proud member." (June Transcript, 21:17-21:19). She then proceeded to provide some thoughts about being born in Cuba and watching her family suffer under the current regime, a portion of which states:

> The autocratic and tyrannical regime that rose in Cuba prevented millions of people, my family and others, from being able to fulfill their hopes and their dreams. And I sincerely hope that non-Cuban Americans of our community can recognize and empathize with the great sadness and regret we Cuban Americans feel even to this day.

(June Transcript, 22:19-23:1). After recounting her family's suffering, Board Member Hantman stated that she could not support "the presence of a book in our school that creates a misleading and inaccurate portrait of Cuba."(June Transcript, 24:12-24:14). In her final comments, Board Member Hantman stated that she must support removal of the Book because she "would not be doing [her] job as a Cuban American, or [her] job as a board member if [she] were to reach any conclusion," and she noted that there were at least 14 omissions or untrue statements in the Book. (June Transcript, 24:19-25:1).

5. Evelyn Langlieb Greer

Board Member Greer declared the system for lodging complaints about so-called offensive library materials as an "excellent process." (June Transcript, 31:21-31:23). That process, she continued, culminated in a decision where 22 professionals decided the Cuba Books were appropriate. (June Transcript, 33:4-336). Those educators determined that the Cuba Books did not bear the "serious, material, irrevocable and clear inaccuracies and biases" that she felt provided grounds to justify removing a book from the school system. (June Transcript, 34:17-35:2). She described the School Board's activities as follows:

> We are rejecting the professional recommendation of our staff based on political imperatives that have been pressed upon members of this board, which I completely understand, and with which I sympathize, but one of the

> things we did when we took an oath of office today is to uphold the Constitution of The United States as it has been set down and interpreted by the United States Supreme Court.

(June Transcript, 35:13-35:20).

6. Dr. Martin Karp

Board Member Karp presented some suggestions for addressing the situation, including distributing a supplementary guide for parents to use in working with the Cuba Books whenever those books are checked out of the library. (June Transcript, 37:8-37:12). Board Member Karp also suggested using parent consent forms so that parents can be made aware when their children check out the Cuba Books. He also suggested providing companion books at check out. (June Transcript, 37:12-37:19).

7. Dr. Robert B. Ingram

A number of Board Member Ingram's comments found their way into the news media following the June 14, 2006 meeting. For instance, Board Member Ingram stated that, if certain Board Members did not vote for the measure to remove the Cuba Books, "they can't go home, they might find a bomb under their automobiles,..." (June Transcript, 40:14-40:18). He went on to say that he could not vote his the way his conscience directed "without feeling threatened." (June Transcript, 44:14-14:15).

8. Dr. Marta Perez

Board Member Perez characterized Board Member Ingram's comments as "divisive," and that

his attempts to dramatize the outside pressures on the School Board to be "really inappropriate and offensive." (June Transcript, 47:1-47:10).[12]

III. FIRST AMENDED COMPLAINT

As noted above, Plaintiffs filed a First Amended Complaint on July 19, 2006. Federal Rule of Civil Procedure 15(a) allows a party to amend its complaint once without leave of court "any time before a responsive pleading is served." A motion to dismiss is not a responsive pleading. *Williams v. Board of Regents of the Univ. Sys. of Georgia*, 441 F.3d 1287, 1296 (11th Cir. 2006) (citing *Chilivis v. SEC*, 673 F.2d 1205, 1209 (11th Cir. 1982)). Therefore, it was within Plaintiffs' discretion to file the First Amended Complaint. Technically, Plaintiffs' filing renders Defendants' Motion to Dismiss moot. Nevertheless, I have considered below the most salient issue contained in the Motion to Dismiss, namely, two of the Plaintiffs' standing in this case.

IV. STANDING

It is axiomatic that, in order for there to be a justiciable "case or controversy," a party must have standing to seek the relief requested. *Florida Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1083 (11th Cir. 2004). At the outset, the party that invokes federal jurisdiction bears the burden of proof on standing. *Florida Public Interest*, 386 F.3d at 1083.

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[12] It does not appear that Board Member Solomon C. Stinson spoke at the June 14, 2006 meeting.

Defendants originally sought to dismiss the Complaint on grounds that Plaintiffs lack standing.[13] In assessing the arguments raised in support of dismissal, I must accept as true all allegations found within the Complaint. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206-07, 45 L.Ed.2d 343 (1975). However, since the parties have filed affidavits relating to the issue, I may consider those affidavits in reaching my decision on standing. *Id.* at 501-02, 95 S.Ct. 2197. I will evaluate whether Aidan Balzli, Mr. Balzli's son, and the ACLU, have standing in this case.

A. Aidan Balzli

To have standing, a plaintiff must establish that (1) he suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision of the court.

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[13] Despite this Court's instruction in the Amended Order Denying Emergency Motion for Temporary Restraining Order and Setting Motion for Preliminary Injunction that Defendants should file "any motions directed the Complaint" no later than July 14, 2006, Defendants took it upon themselves to reserve filing a memorandum of law in support of their Motion to Dismiss until July 18, 2006. Presumably, Defendants' reasoning is that they seek dismissal on standing grounds, and based on my July 6, 2006 Order Requiring Supplemental Briefing on Standing Issue, they need not address those issues until July 18, 2006 (when their response to Plaintiffs' memorandum of law on standing was due). Defendants' chosen course of action resulted in Plaintiffs having only one day to respond to the Motion to Dismiss, a fact that I find inappropriate given all parties' awareness of the abbreviated briefing schedule in this case.

Sierra Club v. Johnson, 436 F.3d 1269, 1276 (11th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992)); *National Alliance for Mentally Ill, v. Board of County Comm'rs of St. Johns County*, 376 F.3d 1292, 1296 (11th Cir. 2004).

Plaintiffs contend that Mark Balzli has standing to sue on behalf of his son, Aidan Balzli. In the Declaration of Mark Balzli ("Balzli Declaration"), Mr. Balzli states that he is a member of the ACLU, and a parent of a six year-old, Aidan Balzli, who is enrolled in a public school in the Miami-Dade County School District. (Balzli Declaration ¶ 1 and 2). He further states that he wants his son to have access to both *¡Vamos a Cuba!*, and *A Visit to Cuba* through the library at the school his son attends. (*Id.* at ¶ 3). He had planned to check out the book and read it with his son before the School Board entered its Final Order. (*Id.*).

Mr. Balzli also testified at the preliminary injunction hearing. His testimony reveals that as a parent of a student attending North Beach Elementary, he is entitled to accompany his son to the school library before the school day begins or after it concludes. He also testified that he is aware that the Miami-Dade School system has an inter-library loan system of exchanging books between schools.

A number of other witnesses testified about the school libraries' accessibility to parents of school-children in Miami-Dade County. For instance, Maria Tavel-Visiedo, a principal of an elementary school in the School District, testified that Miami-Dade

County schools encourage parents to visit the libraries with their children. She also explained that parents may view the libraries' collections over the Internet and actually request that books be moved between schools for the benefit of their children. Although a child must check out a book from the school library, the testimony makes clear that a parent may accompany a child into the library for the purpose of selecting and withdrawing books to read.

Defendants insist that Mr. Balzli has no standing to redress infringements of his son's rights. They rely on *Case v. Unified Sch. Distr. No. 233,* 908 F.Supp. 864, 874 (D. Kan. 1995) for this proposition. In *Case,* a district court dismissed the parents' complaints that their children were denied access to a book removed from the school library because the decision did not abridge the parents' constitutional rights. *Id.* at 873. The opinion noted that parents may only use the high school libraries on a limited basis, when the school district hosts certain "Media Center Nights." *Id.* at 871.[14]

Case ignores the fundamental principle that children are often unable to litigate for themselves and therefore are frequently represented in litigation by their parents. *Smith v. Org. of Foster Families For Equal. & Reform,* 431 U.S. 816, 841, 97 S.Ct. 2094, 2108 n. 44 (1977) ("children usually lack the capacity to make [decisions about their best interests], and thus their interest is ordinarily

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[14] I later discuss *Case* in terms of First Amendment issues. I concur with the district judge's First Amendment analysis, but I decline to follow his conclusions on standing and procedural due process.

represented in litigation by parents or guardians."). Specifically, under Florida law, which applies here under Federal Rule of Civil Procedure 17(b), children may not bring suit due to the disability of nonage of minors. *Kingsley v. Kingsley*, 623 So.2d 780, 784 (Fla. 5th DCA 1993) ("[u]nless a child has a guardian or other like fiduciary, a child must sue by his next friend; however the next friend does not become a party to the suit.").[15] Children can only bring suit through a "next friend." *Id.* This means that, in order to redress a violation of his First Amendment rights, Aidan Balzli had to sue through a "next friend," which in this case is his father.

Case is also factually distinguishable on a number of grounds. First, it relies upon Kansas law, which is slightly different from Florida law in that although it requires minors to sue through a next friend, it expressly states that minors have the capacity to sue and be sued. *In re Morehead*, 10 Kan.App.2d 625, 706 P.2d 480, 481 (1985). Second, *Case* is distinguishable because the Miami-Dade County School District encourages parents to use the school libraries with their children to a greater extent than that allowed in *Case*. Mr. Balzli has the right to visit the library with his son, review books that are kept there, accompany his son through the check-out process, and transfer books between libraries. The *Case* decision explains that parents have much more limited access to the school

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[15] Federal Rule of Civil Procedure 17(b) provides that, "[t]he capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile."

libraries. Mr. Balzli's connection to the issues in this case therefore extend beyond the mere formality of representation of his son as a "next friend." In any event, I reject the analysis employed in *Case* as illogical, and contrary to the greater weight of authority that allows parents to bring suit on behalf of their children. *See e.g., Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Minarcini v. Strongsville City Sch. Distr.*, 541 F.2d 577, 582 (6th Cir. 1976); *Counts v. Cedarville Sch. Distr.*, 295 F.Supp.2d 996, 999 (W.D. Ark. 2003). Therefore, I decline to apply *Case* here.

Mr. Balzli states that he and his son wished to read *¡Vamos a Cuba!* The effect of the Final Order interferes with Aidan Balzli's right to access *¡Vamos a Cuba!* from his school's library. This is a harm which is imminent, which the School Board caused through enactment of its Final Order, and which can be redressed through injunctive relief entered by this Court. I conclude that Mr. Balzli may seek to redress this alleged interference with his son's First Amendment rights.

Mr. Balzli also has standing to redress infringement of his son's due process rights. Plaintiffs complain that the School Board's decisions to ban books in the Series other than the Cuba Books, and to ban the entire Series district-wide violated due process because the School Board failed to follow its own administrative procedures. Aidan Balzli was formerly able to obtain copies of the Cuba Books and other books in the Series through his school's inter-library loan system. Now, Aidan Balzli may not withdraw any Books in the Series because

the School Board has removed them from the school system. Since the School Board made this decision without following its established procedures, Plaintiffs argue, Aidan Balzli's due process rights have been violated. Once again, Aidan Balzli does not have the capacity to bring suit to redress these purported violations. Mr. Balzli, as Aidan's parent, may redress those alleged violations for him.[16]

B. ACLU

Plaintiffs assert that the ACLU has a membership that numbers 3,500, including individual parents whose children attend schools in the School District and who wish their children to have access to the Cuba Books. Mr. Balzli, who is a member of the ACLU, seeks relief on behalf of his son in the form of an injunction preventing enforcement of the Final Order and precluding the removal of the Cuba Books from the School District's libraries.

An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977); *Johnson*, 436 F.3d at 1276; *Sierra Club v. Tennessee Valley Auth.*, 430 F.3d 1337, 1344 (11th Cir. 2005). These

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[16] Defendants did not raise a standing objection to Plaintiffs' Fourteenth Amendment due process claims.

three prerequisites are all that is required for organizational standing, meaning that if an organization satisfies those prerequisites, it is irrelevant that no individual member has brought suit or the organization declines to name a member in the lawsuit. *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999). Defendants challenge only the first prong of the organizational standing test, and therefore I devote my attention to that prong only. *Johnson*, 436 F.3d at 1276 (addressing only the member/standing requirement of the organizational standing inquiry where the defendant failed to challenge the remaining requirements).

I have already determined that Mr. Balzli has standing to redress infringements of his son's rights. Therefore, it appears that the first and only relevant prong of organizational standing is satisfied. The ACLU's standing in this case is akin to other cases where ACLU-related entities had standing to pursue the First Amendment rights of their individual members. *See, e.g., American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 984-85 (9th Cir. 2004) (ACLU had standing on its own and on behalf if its members to challenge state statute on First Amendment grounds where several of its members had been prosecuted under the challenged statute); *American Civil Liberties Union v. City of Pittsburgh*, 586 F.Supp. 417, 420-21 (W.D. Pa. 1984) (individuals who could not purchase *Hustler* magazine due to the mayor's prohibition of its sale conferred standing on the ACLU to prosecute free speech claims on their behalf); *Fitts v. Kolb*, 779 F.Supp. 1502, 1510 (S.D. S.C. 1991) (because the ACLU's members "frequently

take controversial public positions on public officials, public figures, and matters of public concern," the ACLU had standing on behalf of its members to challenge a state criminal libel statute); *American Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 490 (6th Cir. 2004) (lawyer who frequented a courtroom where the Ten Commandments was on display had individual standing to sue under the First Amendment, thereby giving the ACLU standing as well); *American Civil Liberties Union of Kentucky v. McCreary County*, 96 F.Supp.2d 679, 683 (E.D. Ky. 2000) (issuing preliminary injunction and finding that the ACLU had standing to challenge the posting of the Ten Commandments in the county courthouse); *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108-09 (11th Cir. 1983) (ACLU had standing to raise Establishment Clause claim where individual plaintiffs suffered distinct non-economic injuries).

Defendants challenge the ACLU's standing. They acknowledge the cases where parents sue on behalf of their children on First Amendment issues, but note that in such cases the parents are not parties to the action and are not suing in their own rights. In this case, Defendants posit, it is necessary to focus on Mr. Balzli's own status because he is a member of the ACLU; his son is not. Defendants characterize Mr. Balzli's procedural posture as one where he is a party in interest for the benefit of the ACLU's standing. *Watson v. State Farm Mut. Auto. Ins. Co.*, 639 So.2d 687, 688 (Fla. 2d DCA 1994) ("[w]hen a minor is represented by a parent as 'next

friend,' the 'next friend' is not a party to the action; the real party in interest is the minor."). It is Defendants' position that standing is lacking because Mr. Balzli's son is the true party in interest, and he is not a member of the ACLU.

While Defendants' analysis is novel, it reaches an illogical result. As Defendants acknowledge, under Florida law, Aidan Balzli may only bring suit through a next friend, in this case, his father. Therefore, his father has standing to pursue relief on his behalf. The meaning of the requirement that "members would otherwise have standing to sue in their own right" is that the individual would have standing independent of his affiliation with the ACLU. *Freedom Republicans, Inc. v. Fed. Election Comm'n,* 13 F.3d 412, 416 (D.C. Cir. 1994) (for organizational standing to exist, individual members of organization "must independently meet the requirements of Article III."). This is to distinguish organizational standing from standing that arises when the ACLU's own constitutional interests have been infringed. *See, e.g., Rhode Island Affiliate, American Civil Liberties Union, Inc. v. Rhode Island Lottery Comm'n,* 553 F.Supp. 752, 768 n. 12 (D. R.I. 1982) (in case where the ACLU challenged the state's denial of a license to hold a charitable raffle, noting that "[i]t is well established that a corporation, such as the ACLU, has standing to assert violations of the First and Fourteenth Amendments under § 1983, both with respect to freedom of speech, and freedom of association") (internal citations omitted). It does not mean that only the true party in interest may bring suit, and Defendants cite no authority to that

effect. Mr. Balzli's standing to sue on his son's behalf is independent of his affiliation with the ACLU. Accordingly, I find that the first and only relevant element of organizational standing is satisfied.

Because Mr. Balzli, on behalf of his son, and the ACLU both have standing in this case, I need not consider whether the remaining Plaintiffs have standing as well. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 562 n. 9, 50 L.Ed.2d 450 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."); *Rabun County*, 698 F.2d at 1108-09 ("Because we have determined that at least these two individuals have met the requirements of Article III, it is unnecessary for us to consider the standing of the other plaintiffs in this action."). Moreover, given the filing of the First Amended Complaint, Defendants' arguments in support of the Association's dismissal are moot.[17]

V. STANDARD FOR PRELIMINARY INJUNCTION

The Eleventh Circuit has stated that the "grant or denial of a preliminary injunction is a decision within the sound discretion of the district court." *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999). The Eleventh Circuit requires the party moving for a preliminary injunction to meet four factors: (1) the moving party

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[17] I deny the Motion to Dismiss as moot, but this finding is without prejudice for Defendants to raise the arguments again when this case is ripe for discussion on the merits.

demonstrates a substantial likelihood of success on the merits; (2) the preliminary injunction is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would cause to the non-moving party, and (4) the preliminary injunction would not be adverse to the public interest. *Parker v. State Bd. of Pardons and Paroles,* 275 F.3d 1032, 1034-1035 (11th Cir. 2001); *Warren Publ'g, Inc. v. Microdos Data Corp.,* 115 F.3d 1509, 1516 (11th Cir. 1997); *Teper v. Miller,* 82 F.3d 989, 992 n. 3 (11th Cir. 1996); *Northeastern Fl. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fl.,* 896 F.2d 1283, 1284 (11th Cir. 1990); *Haitian Refugee Center, Inc. v. Nelson,* 872 F.2d 1555, 1561-62 (11th Cir. 1989); *Canal Auth. of State of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974). Accordingly, Plaintiffs must meet each of these four requirements before the Court can issue a preliminary injunction. Applying these well-established principles to the facts of this case, I conclude that Plaintiffs have established sufficient evidence in support of each of these four elements, and therefore, Plaintiffs are entitled to a preliminary injunction.

VI. ANALYSIS

A. Applicable Case Law

1. Summary of the First Amendment Constitutional Issues Involved

This case started upon the complaint of one parent at Marjory Stoneman Douglas Elementary School who requested that one book, *Vamos a Cuba,*

and its English counterpart, be removed from the school library. The issues pertinent to this complaint do not intrude into the classroom, or into the compulsory or elective courses taught there. They do not involve the rights of students or others to speak in a school's "created" public forum or in its nonpublic forum. They do not involve textbooks or any books which students are required to read in any class or for any class. On the contrary, the only books in contention in this case are *library* books, books that are by their nature optional rather than required reading.

Furthermore, even as to library books, the action before the Court does not involve the *acquisition* of books. The Plaintiffs here have not sought to compel the School Board to *add* to the school libraries' shelves any books that students desire to read. Rather, the action challenged in this case, like in *Island Trees Union Free School District v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), is the *removal* from school libraries of books originally placed there by school authorities, or without objection from them.

This case is unique because, instead of addressing a high school level book involving vulgar language and inappropriate sexual references, or dealing with questionable educational themes, the library books in contention are written in a simple manner for young elementary school children and provide superficial introductions about how people live their lives in foreign countries.[18] The heart of the

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[18] One published journal providing reviews of children's

argument is that the Cuba Books omit the harsh truth about totalitarian life in Communist Cuba. It is the view of a majority of the School Board members that the Cuba Books (and as an aside, all other books in the Series) should be banned because they believe their neutral view-point is too favorable to Communist Cuba.

Thus, in terms of constitutional analysis, the issue before the Court, like in *Pico*, is a narrow one. First, what limitations, if any, does the First Amendment impose upon the discretion of the School Board to remove these library books from the Miami-Dade County school libraries? Second, for purposes of a preliminary injunction, has the School Board exceeded those limitations? In this Order, I first address the First Amendment issue under the United States Supreme Court and Eleventh Circuit case law. I next apply the case law to the record on preliminary injunction and conclude that the School Board has exceeded First Amendment limitations.

2. Analysis of Supreme Court Case Law On First Amendment Removal Issue

An analysis of the applicable Supreme Court case law is important in determining which "test" applies to this case. This is because: "First amendment doctrines are manifold, and their diverse facts and analyses may reveal but one consistent truth with respect to the amendment-each case is decided on its own merits." *Bishop v. Aronov*, 926

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literature describes the Cuba Books in this way: "These books offer superficial introductions to geography, people, customs, language, and daily life." (Plaintiffs' Exhibit 18).

F.2d 1066, 1071 (11th Cir. 1991).

The Supreme Court has long recognized that local school boards have broad discretion in the management of school affairs. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390, 402, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). *Epperson v. Arkan.,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968) reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities," and that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." *Tinker v. Des Moines Indep. School Dist.,* 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969), noted that we have "repeatedly emphasized ... the comprehensive authority of the States and of school officials ... to prescribe and control conduct in the schools." The Supreme Court has also acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick,* 441 U.S. 68, 76-77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979). Therefore, in *Pico,* the Court confirmed its full agreement that local school boards must be permitted "'to establish and apply their curriculum in such a way as to transmit community values,'" and that "'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social,

moral, or political.'" *Pico,* 457 U.S. at 864, 102 S.Ct. 2799 (citation omitted).

At the same time, the Supreme Court has necessarily recognized that the discretion of the states and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. *Pico,* 457 U.S. at 863-864, 102 S.Ct. at 2807; *Tinker,* 393 U.S. at 511, 89 S.Ct. at 736 ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."); *Epperson,* 393 U.S. 97 at 103-105, 89 S.Ct. at 270; *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 637-38, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion .... If there are any circumstances which permit an exception, they do not now occur to us."); *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967) ("The First Amendment ... does not tolerate laws that case a pall of orthodoxy over the classroom.").

Indeed, it has been long recognized that students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506, 89 S.Ct. at 736, and "... therefore local school boards must discharge their 'important, delicate, and highly discretionary functions' within the limits and constraints of the First Amendment." *Pico,* 457 U.S. at 865, 102 S.Ct. at 2807. With regard to school

libraries, the Supreme Court's plurality, in *Pico*, stated: "The special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students." *Pico*, 457 U.S. at 868, 102 S.Ct. 2799. Similarly, the Sixth Circuit has said the school library is "... a mighty resource in the free marketplace of ideas." *Minarcini v. Strongsville City School District*, 541 F.2d 577, 582 (6th Cir. 1976) (citing *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919)).

Consistent with these principles, the Plaintiffs urge the Court to follow and apply the Supreme Court's rationale in *Pico* in deciding the First Amendment issues.[19] In *Pico*, no less than seven separate written opinions addressed the issue of whether the members of a board of education could constitutionally remove from a high school and junior high school library, books the board had characterized as "'Anti-American, Anti-Christian, Anti-Sem[i]tic, and just plain filthy.'" *Pico*, 457 U.S. at 857, 102 S.Ct. at 2801 (citation omitted). A sharply-divided Court voted to affirm the Court of Appeal's decision to remand the case for a determination of the school board's motives. The Supreme Court determined that questions of fact remained regarding "the possibility that the [School

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[19] In the School Board's "Supplemental Opinion on the Book Review and Removal Process Under Board Rule 6Gx13-6A-1.26 (Instructional Materials and Resources) (Plaintiffs' Exhibit 12, page 6)," the School Board Attorney acknowledged that *Pico* was the "leading case on school board removal of library books ...."

Board's] decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on [the School Board's] part to impose upon the students ... a political orthodoxy to which [the board members] and their constituents adhered." *Id.* at 875, 102 S.Ct. at 2812. A majority of the Court supported this conclusion.[20] However, the Court did not render a majority opinion. Justice Brennan, joined by three Justices, wrote what is commonly referred to as the "plurality" opinion.

The plurality opinion first outlined the nature of the students' First Amendment rights and subsequently concluded that, based on the evidentiary materials in the record, a genuine issue of fact existed as to whether the school officials had exceeded First Amendment limitations on their discretion to remove library books from the schools. The *Pico* plurality stressed the "unique role of the school library" as a place where students could engage in voluntary inquiry. *Id.* at 868-69, 102 S.Ct. at 2809 (plurality opinion) (citations omitted). It also observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding" and that the school library served as "the principal locus of such freedom." *Id.* The *Pico* plurality recognized that the

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[20] Justices Stevens, Marshall, and Blackmun all joined this part of the opinion. Justice White's agreement may be inferred from his concurrence. Justice White's vote to remand for trial implied that he accepted the viability of the plaintiffs' claim that the attempted imposition of orthodoxy was a claim upon which relief could be granted.

high degree of deference accorded to educators' decisions, regarding curricular matters, diminishes when the challenged decision involves a non-curricular matter. *Id.* at 868-70, 102 S.Ct. at 2809. Emphasizing the voluntary nature of public school library use, the plurality in *Pico* observed that school officials' decisions regarding public school library materials are properly viewed as decisions that do not involve the school curriculum and that are therefore subject to certain constitutional limitations. *Id.* The plurality recognized that "... the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students." *Id.* at 853, 102 S.Ct. 2799. In rejecting the school officials' claim of absolute discretion to remove books from their school libraries, the *Pico* plurality recognized that students have a First Amendment right to receive information and that school officials are prohibited from exercising their discretion to remove books from school library shelves "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* at 872, 102 S.Ct. at 2810 (citing *Barnette*, 319 U.S. at 642, 63 S.Ct. at 1187).

The *Pico* plurality observed that if school officials intended by their removal decision to deny students access to ideas with which the school officials disagreed, and this intent was the decisive factor in the removal decision, then the school officials had "exercised their discretion in violation of

the Constitution." *Id.* The *Pico* plurality explained that a "decisive factor" was one that was a "substantial factor" in the absence of which the opposite decision would have been reached. *Id.* at 871 n. 22, 102 S.Ct. at 2810 n. 22 (citing *Mt. Healthy City School Dist. Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)). The Court in its plurality opinion implicitly recognized, however, that an unconstitutional motivation would not be demonstrated if the school officials removed the books from the public school libraries based on a belief that the books were "pervasively vulgar" or on grounds of "educational suitability." *Id.* at 870-72, 102 S.Ct. at 2810.[21]

As summarized by the plurality, "... we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' Such purposes stand inescapably condemned by our precedent." *Id.* at 872, 102 S.Ct. at 2810 (citation omitted). Explaining that while local school boards possess significant discretion to determine the content of their school libraries, "...

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[21] In pointing to distinctions between impermissible and permissible motives, Justice Brennan did not elaborate on how the courts are to define and ascertain the difference between an intent to suppress ideas and an intent to remove books because they are educationally unsuitable. Justice Blackmun, in his concurring opinion, agreed with Justice Brennan that school boards may not deny access to an idea simply because school board officials disapprove of that idea for partisan or political reasons. *Id.* at 879, 102 S.Ct. at 2804.

that discretion may not be exercised in a narrowly partisan or political manner." *Id.* at 871, 102 S.Ct. at 2810. By way of example, the plurality stated: "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas." *Id.* at 870-71, 102 S.Ct. at 2810.

The Supreme Court next considered those evidentiary materials which raised genuine issues of material fact concerning whether the school board exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries. Of significant weight was that in making its decision, the school board did not employ established, regular, and facially unbiased procedures for the review of the controversial materials. Instead, the school board ignored the "advice of library experts," the views of "librarians and teachers within the Island Trees School system," the advice of the Superintendent of Schools, and the guidance of publications that rate books for junior and senior high school students. Nor did the school board undertake an independent review of other books in the school libraries. In sum, "... some of the evidentiary materials presented ... do not rule out the possibility that the [school board's] removal

procedures were highly irregular and ad hoc-the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations." *Id.* at 875, 102 S.Ct. at 2812. The plurality found significant that the evidence "... plainly does not foreclose the possibility that the [school board's] decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on the [school board's] part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which the [school board] and their constituents adhered." *Id.* at 875, 102 S.Ct. at 2812.[22]

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[22] In a concurring opinion, Justice Blackmun focused not on the right to receive information recognized by the plurality, but on the school board's discrimination against disfavored ideas. Justice Blackmun explicitly recognized that *Pico's* facts invoked two significant, competing interests: the inculcative mission of public high schools and the First Amendment's core proscription against content-based regulation of speech. *Id.* 457 U.S. at 876-79, 102 S.Ct. at 2812-14 (Blackmun, J., concurring). Justice Blackmun noted that the State must normally demonstrate a compelling reason for content-based regulation, but that a more limited form of protection should apply in the context of public high schools. *Id.* at 877-78, 102 S.Ct. at 2813. Balancing the two principles, Justice Blackmun agreed with the plurality that the school board could not remove books based on mere disapproval of their content but could limit its collection for reasons of education suitability or budgetary constraint. *Id.* at 879, 102 S.Ct. at 2814.

The four spirited dissents prompted by the facts in *Pico* each focused on the school board's duty to "'inculcat[e] fundamental values necessary to the maintenance of a democratic political system,'" *id.* at 889, 102 S.Ct. at 2819 (quoting *Ambach v. Norwick*, 441 U.S. 68, 74, 99 S.Ct. 1589, 1595, 60 L.Ed.2d 49 (1979)), and the broad discretion needed properly to carry out that responsibility. The dissenters

The Eleventh Circuit has not yet had the opportunity to directly address and apply *Pico*,[23]

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believed that the plurality's decision would trigger an improper arrogation of the school board's power to the courts. For example, Chief Justice Burger declared that, "[u]ltimately the federal courts will be the judge of whether the motivation for book removal was 'valid' or 'reasonable.' ... Discretion must be used, and the appropriate body to exercise that discretion is the local elected school board, not judges." *Id.*, at 890-91, 102 S.Ct. at 2820. Justice Powell similarly noted that "[t]he plurality opinion today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of public schools." *Id.* at 893, 102 S.Ct. at 2821-22. Justice Rehnquist likewise stated, "when [the government] acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people.... [A]ctions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign." *Id.* at 909-10, 102 S.Ct. at 2829-30. Similarly, Justice O'Connor agreed that "the plurality's analysis overlooks the fact that in this case the government is acting in its special role as educator." *Id.* at 921, 102 S.Ct. at 2835.

The dissenters in *Pico* made no contention that the First Amendment did not encompass the right to receive information and ideas, but merely argued that the students could not freely exercise this right in the public school setting in light of the countervailing duties of the school board. Justice Rehnquist's opinion highlighted the source of contention when he declared: "The libraries of [elementary and secondary] schools serve as supplements to this inculcative role. Unlike universities or public libraries, elementary and secondary schools are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas." *Id.* at 915, 102 S.Ct. at 2832 (emphasis supplied).

[23] But see dicta in *Virgil v. School Board of Columbia County, Florida*, 862 F.2d 1517, 1523 n. 8 discussed below.

although the Fifth Circuit has done so in *Campbell v. St. Tammany Parish School Board,* 64 F.3d 184 (5th Cir. 1995), a case which involved a First Amendment challenge to the removal of a book from all of the public school libraries in St. Tammany Parish, Louisiana. The Fifth Circuit stated that even though the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the School Board's removal decision was based on unconstitutional motives.[24] *Id.* at 189. The Fifth

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[24] The Fifth Circuit remanded the cause for trial because it did not have a "full picture" of the reasons why the School Board members constituting the majority voted to remove *Voodo & Hoodoo* from all of the parish public school libraries. 64 F.3d at 190. The Fifth Circuit did, however, comment on the evidence that was before it by way of summary judgment *in a manner which is significant here.* The Court stated: "Although our examination of the summary judgment evidence ultimately leads us to remand the instant case for further development of the record, we are moved to observe that, in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the School Board's non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to "strangle the free mind at its source." That possibility is reinforced by the summary judgment evidence indicating that many of the School Board members had not even read the book, or had read less than its entirety, before voting as they did; many had done nothing more than browse through the book, while others had read only the several excerpts selected and furnished by a representative of the Louisiana Christian Coalition. Moreover, we note that the School Board's failure to consider, much less adopt, the recommendation of the two previous committees to restrict the Book's accessibility to eighth-graders with written parental permission but to leave

Circuit reasoned that the Supreme Court has previously stated that, in cases in which there is no clear Supreme Court majority, courts should look to "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977); *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976). The Fifth Circuit stated that Justice White's concurrence in *Pico* represents the narrowest grounds for the result in that case, and it does not reject the plurality's assessment of the constitutional limitations on school officials' discretion to remove books from a school library. *Campbell,* 64 F.3d at 189. The concurrence merely states that the procedural posture of the case did not require addressing the constitutional questions presented because a material issue of fact existed, precluding summary judgment. *Pico,* 457 U.S. at 882-86, 102 S.Ct. at 2816-17 (White, J., concurring in the judgment).[25]

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the Book on the library shelf-in apparent disregard of its own outlined procedures-has the appearance of "the antithesis of those procedures that might tend to allay suspicions regarding [the School Board's] motivations." The circumstances surrounding the School Board's vote to remove the Book cannot help but rise questions regarding the constitutional validity of its decision." *Id.* at 189-90.

[25] The Third Circuit held a broader view of the *Pico* plurality decision in *Kreimer v. Bureau of Police for Town of Morristown,* 958 F.2d 1242, 1255 (3d Cir. 1992) ("Our review of the Supreme Court's decisions confirms that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas. *Pico* signifies that,

consistent with other First Amendment principles, the right to receive information is not unfettered and may give way to significant countervailing interests. At the threshold, however, this right, first recognized in *Martin* and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information.").

Likewise, the Ninth Circuit relied on a broad view of *Pico* in *Monteiro v. Tempe Union High School District,* 158 F.3d 1022, 1027 n. 5 (9th Cir. 1998). That court stated:

> We find *Pico* to be particularly helpful in identifying the First Amendment interests that are involved in this case. *Pico* held that a school board could not remove books from a school library if it did so "in a narrowly partisan or political manner." 457 U.S. at 870-71, 102 S.Ct. 2799, 73 L.Ed.2d 435. It based its decision on two First Amendment principles that we find are also relevant in the context of a school curriculum. The first is the well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press, because the right to distribute information necessarily protects the right to receive it. 457 U.S. at 866, 102 S.Ct. 2799, 73 L.Ed.2d 435; *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.") (right to receive advertising). The second involves the students' rights to receive a broad range of information so that they can freely form their own thoughts: "[m]ore importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." 457 U.S. at 867,

Subsequent to *Pico*, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). In *Hazelwood*, students sued when the principal refused to publish several articles in a school newspaper. *Id.* at 262, 108 S.Ct. at 565. In upholding the school's actions, the Supreme Court held that educators may exercise control over student expression in a curricular program if the restrictions are "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273, 108 S.Ct. at 571. The concern was whether the First Amendment required a school to tolerate particular student speech. At issue was educators' authority over school-sponsored publications, theatrical productions, and other expressive

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> 102 S.Ct. 2799, 73 L.Ed.2d 435 (emphasis added). The Supreme Court has long recognized that the freedom to receive ideas, and its relation to the freedom of expression, is particularly relevant in the classroom setting: The classroom is peculiarly "the marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D. N.Y. 1943)).

Id.; *see also Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 779 (8th Cir. 1982) (recognizing "chilling effect" of removing films from school curriculum, which clearly indicated that ideas contained in films were unacceptable and should not be discussed or considered).

activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school. The Supreme Court stated that these activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impact particular knowledge or skills to student participants and audiences. *Id.* at 570, 108 S.Ct. 562.

The *Hazelwood* decision was authored by Justice White who had narrowly concurred in *Pico.* The majority opinion in *Hazelwood,* however, did not refer or cite to *Pico.* Presumably, that is because the issues involved were totally different in the sense that *Hazelwood* was a "student speech" case, while *Pico* dealt with removal of books from a school library. Nonetheless, the question remains whether, under the more lenient *Hazelwood* test, school boards would not offend the First Amendment by exercising control over certain books in school libraries so long as their actions are reasonably related to legitimate pedagogical concerns. A review of the Eleventh Circuit case law, however, demonstrates that the *Hazelwood* test has not been so expanded where non-curricular books are at issue and where, even under the *Hazelwood* standard, the school officials' actions were motivated by a disagreement with the views expressed in the books as compared to pedagogical concerns relating to vulgarity and sexuality.

Based on its dicta, I conclude that the Eleventh Circuit would be guided by the *Pico* plurality decision if it is clearly demonstrated that

the majority of the School Board's opposition to the content of ideas expressed in the banned books was the "decisive factor" underlying the decision to remove. In my view, the Eleventh Circuit would conclude that the removal of books from school libraries implicates the First Amendment where the books have become controversial simply because the majority of School Board members disagreed with their content, or point-of-view, or because those members desired to impose upon their students a political orthodoxy to which they and their constituents adhered.[26] Simply put, as stated in *Pico*, school officials cannot remove books "simply because they dislike the ideas contained in those books ...." *Pico*, 457 U.S. at 872, 102 S.Ct. at 2810 (plurality opinion).

Furthermore, I conclude that the Eleventh Circuit would follow *Pico* in considering whether school officials followed regular procedures when deciding whether to remove books from libraries. This requirement increases the likelihood that legitimate reasons would predominate in

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[26] The School Board Attorney advised the School Board that: "... the more lenient *Hazelwood* standard applies to school boards' decisions to remove books, at least when the removal is from the curriculum, including optional readings in an elective course and it could be argued that it should apply to removal from school libraries, as those books are often deemed 'instructional materials,' and one factor in *Hazelwood* relevant to the determination of whether an activity could fairly be characterized as part of the curriculum is whether 'the public ... reasonably perceive [the activity] to bear the imprimatur ...' The School Board Attorney concluded: "Still ... the *Pico* standard, as it related directly to ... ." (Plaintiffs' Exhibit 12, page 6).

deliberations. This is not to say that mere violation of designated procedures violates the First Amendment. But, irregular procedures may substantiate the existence of illegitimate motivations in order to state a claim under *Pico*. Given the existence of irregular procedures, the Eleventh Circuit would likely follow the Fifth Circuit's rationale in *Campbell v. St. Tammany Parish School Board* that: "the School Board's decision to remove the books must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter," and, as such, following *Pico*, the "key inquiry in a book removal case is the school officials' substantial motivation in arriving at the removal decision." 64 F.3d 184, 189-90 (5th Cir. 1995).

3. Eleventh Circuit Case Law

In *Virgil v. School Board of Columbia County, Florida*, 862 F.2d 1517 (11th Cir. 1989), the Eleventh Circuit upheld application of *Hazelwood's* "legitimate pedagogical concerns" test to the school board's decision to discontinue use of a humanities textbook from an elective high school class because of optional reading material included in the text that it deemed sexual and vulgar. In that case, the Court confronted the question of "... whether the first amendment prevents a school board from removing a previously approved textbook from an elective high school class because of objections to the material's vulgarity and sexual explicitness." *Id.* at 1518.

In consequence, in addressing this issue, the [illegible] emphasized two important points which are [illegible] here. First, the decision at issue involved

curricular matters. The Court recognized that, "[i]n matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity." *Id.* at 1520 (citing *Hazelwood,* 484 U.S. at 268-70). The materials removed were part of the textbook used in a regularly scheduled course of study in the school. The plaintiffs argued that the materials removed not only were part of an elective course, but were optional, not required reading. The Court, however, concluded that the optional readings removed were part of the school curriculum. It stated:

> Plaintiffs further point out that the materials removed in this case not only were part of an elective course, but were optional, not required readings. For the reasons just mentioned, we conclude that the optional readings removed in this case were part of the school curriculum. Just as elective courses are designed by school officials to supplement required courses, optional readings in a particular class are carefully selected by the teacher as relevant and appropriate to supplement required readings in order to further the educational goals of the course. This is especially true in the instant circumstances, where the optional readings were included within the text itself, and thus had to accompany the student every time the text was taken home. Such materials would obviously

carry the imprimatur of school approval.

Virgil, 862 F.2d at 1522.

In discussing the application of the *Hazelwood* standard, the Court, in a footnote, stated, by way of dicta, that, "We need not in this case address the validity of school action to remove a book from a separate outside reading list." *Id.* at 1522 n 5. Nonetheless, it further stated:

> Assuming arguendo that the *Hazelwood* standard would apply because the scope of curriculum design would include not only required readings but also the selected additional readings which are relevant and appropriate to accomplish the overall goal for the course, the distinction between optional readings which are merely on a separate, outside reading list might affect the application of the *Hazelwood* reasonableness test. For example, **it might be easier to make such separate, outside readings subject to parental approval, or otherwise limit the imprimatur of school approval.**

Id. (emphasis added).

The Eleventh Circuit's dicta deals with the *Hazelwood* concern that the indicia of school sponsorship increase the likelihood of erroneous attribution to the school, and that school board members may therefore have a legitimate interest in dissociating themselves with the content of the book. But, as noted by the Eleventh Circuit, even where

books are on a "separate outside reading list," and, therefore, within the scope of the curriculum design, less onerous remedies than "book banning" can be narrowly tailored to avoid implicating the First Amendment. The "narrowly tailoring" requirement is mandated by Supreme Court precedent. "'[E]ven though the governmental purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian,* 385 U.S. at 602, 87 S.Ct. at 683 (quoting *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)); *Sabel v. Stynchcombe,* 746 F.2d 728, 730 (11th Cir. 1984). Here, the School Board did not even consider "narrowly tailoring" the use of the books at issue.

The second consideration in *Virgil,* which is not applicable here, is "the fact that the motivation for the Board's removal of the readings ha[d] been **stipulated** to be related to the explicit sexuality and excessively vulgar language in the selections." *Virgil,* 862 F.2d at 1522-23 (emphasis added). While the Eleventh Circuit recognized that "courts have not hesitated to look beyond the stated reasons for school board actions," *id.* at 1523 n. 6, it determined it was clear that the stipulated motivation, from *Hazelwood* and other cases, "... is a legitimate concern." *Id.* at 1523. Citing *Hazelwood,* the Eleventh Circuit held that school officials can "'take into account the emotional maturity of the intended audience in determining ... [the appropriateness of] potentially sensitive topics'" such as sex and vulgarity. *Id.* (quotations and citations omitted). Here, the School

Board does not contend that the children's books at issue involve sensitive topics such as sex and vulgarity. But, even where the stipulated motivation of the School Board relates to legitimate concerns, it is still necessary to determine "whether the Board action was *reasonably* related thereto." *Id.*; *cf. Searcey v. Harris,* 888 F.2d 1314, 1319 (11th Cir. 1989) ("Since the purpose of a curricular program is by definition 'pedagogical,' the *Cornelius* standard requires that the regulations be reasonable in light of the pedagogical purposes of the particular activity.") (citing *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 809 (1985)). In assessing the reasonableness of the board's actions, the Eleventh Circuit, besides focusing on the fact that a substantial number of students had not reached the age of majority, noted that "disputed materials have not been banned from the school," *Virgil,* 862 F.2d at 1525, and that (of considerable importance here), "The *Humanities* textbook and other adaptations of *Lysistrata* and *The Miller's Tale* are available in the school library. No student or teacher is prohibited from assigning or reading these works or discussing the themes contained therein in class or on school property." *Id.*

For these reasons, the Eleventh Circuit found *Board of Education v. Pico* to be inapplicable, even though the Plaintiffs/Appellants argued that the facts were most analogous to the removal of books from a library. In a footnote which is significant to this case, the Eleventh Circuit, based on the stipulated reasons for the board's actions, found the motive at issue in *Pico* to be absent. Moreover, the

Eleventh Circuit left open the appropriate standard to be applied in a case where one party has demonstrated that the removal stemmed from opposition to the "ideas contained in the disputed materials." The Court stated:

> Appellants argue that this case is most analogous to the removal of books from a library, and thus that it is governed by *Board of Education v. Pico*. We disagree. *Pico* involved a school library, and the plurality took special note of the "unique role of the school library" as a repository for "voluntary inquiry." More significantly, the *Pico* plurality held that a school board may not remove books from a school library where a constitutionally impermissible motive-**board members' opposition to the content of ideas expressed in the disputed materials-was the "decisive factor" underlying the decision to remove**. By virtue of the parties' stipulated reasons for the Board action in this case, the motive at issue in *Pico* is absent here. **We make no suggestion as to the appropriate standard to be applied in a case where one party has demonstrated that removal stemmed from opposition to the ideas contained in the disputed materials.**

Id. at 1524 n. 8 (emphasis added) (internal quotations and citations omitted).

Subsequent to *Virgil,* the Eleventh Circuit, in *Searcey v. Harris,* 888 F.2d 1314 (11th Cir. 1989), rejected the school board's argument, in that case, that *Hazelwood* does not prohibit school officials from engaging in "viewpoint based" discrimination. In *Searcey,* a peace organization brought suit challenging the school board's denial of their request to present certain information to public high school students during "career day." The School Board argued that *Hazelwood* changed the First Amendment analysis applied to school officials' decisions relating to curricular programs. In discussing *Hazelwood,* the Eleventh Circuit again emphasized the Supreme Court's holding that educators may exercise control over student expression in a curricular program if the restrictions are "reasonably related to legitimate pedagogical concerns." The Court went on to state, however, "We fail to see how this standard differs from the *Cornelius* standard for nonpublic forums; instead it is merely an application of that standard to a curricular program." *Id.* at 1319. The Court emphasized that *Hazelwood* involved a **content based** distinction: the principal decided that the subject of teenage sexuality was inappropriate for some of the younger students. There was no indication that the principal was motivated by a disagreement with the **views** expressed in the articles. *Id.* at 1324-1325. Of importance, the Eleventh Circuit stated:

> The Board argues that *Hazelwood* does not prohibit school officials from engaging in viewpoint based

> discrimination. **We disagree.** *Hazelwood* involved a content based distinction; the principal decided that the subject of teenage sexuality was inappropriate for some of the younger students. There was no indication that the principal was motivated by a disagreement with the views expressed in the articles. Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content,* **we do not believe it offers any justification for allowing educators to discriminate based on viewpoint.** The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. **Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.**

Id. at 1324-1325 (emphasis added in bold) (internal citations omitted).[27]

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[27] In addressing *Hazelwood,* the Eleventh Circuit further commented:

> Although the *Hazelwood* Court concluded that school officials should have great control over curricular expression, that discussion was intended to exempt student expression in a curricular activity from the more stringent standard applied to student speech in noncurricular activities enunciated in *Tinker v. Des Moines Independent Community School*

4. School Board Response

The School Board first argues that *Pico* has no precedential value and, to the degree that the seven different opinions of the Justices retain any prescriptive value, they militate in favor of the School Board's decision to remove the book. Second, it argues that the books removed were so rife with material omissions of basic facts, and are so misleading as to present a false view of the countries as a matter of fact, that their removal would be

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District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In *Tinker*, the court held that a school may not prohibit student expression unless it will materially disrupt the operation of the school. *Id.* at 509, 89 S.Ct. at 738. Therefore the emphasis in *Hazelwood* on control over curricular expression was intended to distinguish the case from *Tinker* and justify the application of the *Cornelius* standard. *Hazelwood*, 484 U.S. at 271, 108 S.Ct. at 570; *see Alabama Student Party v. Student Government Ass'n*, 867 F.2d 1344, 1345 (11th Cir.1989)(*Cornelius* standard applicable to situation where outsiders seek access to school).

Of somewhat more concern is the suggestion by the School Board that *Hazelwood* eliminates the requirement that restrictions on speech in a curricular activity be viewpoint neutral. Although the Supreme Court did not discuss viewpoint neutrality in *Hazelwood*, there is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views. As discussed, *supra*, Hazelwood acknowledges a school's ability to discriminate based on *content* not *viewpoint*.

Searcey, 888 F.2d at 1324-25 (emphasis in original).

justified under Justice Brennan's "educational suitability test." Third, it argues that under the **subsequently** adopted *Hazelwood* test, removal would be proper if the school library **selection** process were regarded as "school sponsored speech" because the replacement of such inaccurate books is "reasonably related to a legitimate pedagogical concern." Finally, it argues that under the contemporary First Amendment precedent of the United States Supreme Court and the Eleventh Circuit, citing the Eleventh Circuit decision in *Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004), that the selection and removal of elementary school library books, at least under the system adopted by the School Board is clearly a "curricular function" in a nonpublic forum that constitutes "government speech," which implicates no First Amendment rights. None of these arguments have merit. I discuss the first three arguments later in this Order but I address the last argument now.

The *Bannon* case cited as controlling authority by the School Board is not on point. It was a "student free speech case" where the school district and school principal required the student to remove religious words and symbols from murals painted for a school beautification project. *Id.* at 1211. The Eleventh Circuit affirmed the summary judgment order of the district court that the School District and Principal never created a public forum, the murals were school-sponsored speech and their response was reasonably related to legitimate pedagogical objectives. *Id.* at 1217. From this limited set of facts,

which are totally unrelated to the facts and issues in this case, the School Board makes the "leap" that: "Obviously, the selection of school library books, and their removal by school authorities, by applying the same standards for textbooks, constitutes 'government speech.'" The School Board's analysis is based on a number of faulty premises. It first argues that the removal of books in elementary school libraries clearly constitutes a "nonpublic forum" because the process is not "open to public participation." (Defendants' Initial Memorandum of Law in Opposition to Motion for Preliminary Injunction, page 12 n. 3). This contention is clearly wrong and is directly contrary to the reality of what transpired before the SMRC, the DMRC and the School Board itself on April 18, 2006 in which extensive public debates and public participation were permitted. (Plaintiffs' Exhibits 5, 7, 10, 22, and 33).

Next, the Eleventh Circuit made it clear that: "*Hazelwood* controls all expression that (1) bears the imprimatur of the school, and (2) occurs in a curricular activity, but conclude that Shararh's murals occurred in such a curricular context. Thus, the murals constituted school-sponsored expression within the meaning of *Hazelwood*." *Bannon*, 387 F.3d at 1214 (citations omitted). In addressing the question of whether the student's mural expression occurred in the context of a "curricular activity," the Eleventh Circuit stated that: "To be considered curricular, expressive activities need not occur in a 'traditional classroom setting.' Instead, expressive activities are curricular so long as they are merely (1)

'supervised by faculty members,' and (2) 'designed to impart particular knowledge or skills to student participants and audiences.'" *Id.* (internal citations omitted).

Unlike the situation in *Bannon,* we do not have a circumstance where the principal or any other faculty member was "sponsoring" or "supervising" a school project relating to the Cuba Books. Instead, we are dealing with an elementary school library at Marjory Stoneman Douglas Elementary School where only **three** copies of the Cuba Books were in the library circulation system and were acquired in 2001, 2003 and 2004. The remaining copies were within the other school libraries [49 copies in 33 schools acquired from 2001 to 2006]. Obviously, only a very limited number of students would have access to the Cuba Books at any one time.[28]

There is no evidence in this record that these books, other than remaining on the library shelves, were part of any school project that allowed student participants [namely those who may have checked out the book] to express themselves artistically or to appreciate how other students felt about the book. There was no evidence at the preliminary injunction hearing that the Cuba Books were purchased as

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[28] The Minutes of the DMRC Meeting of May 22, 2006 show that Mr. Pimienta (Defendant's witness) provided information to the DMRC that the book series "is located in the 900 section under Non-Fiction (History, Geography, Cultures), and it is not a reference book." (Plaintiffs' Exhibit 7, Minutes at 4). The SMRC recommendation of April 19, 2006 described the status of the Cuba Books as "part of the collection of titles available in the Media Center at Marjory Stoneman Douglas Elementary School." (Plaintiffs' Exhibit 10).

textbooks or assigned by any classroom teacher to any student for any classroom project or as optional reading, or that any student checked out the Cuba Books for use in conjunction with any classroom or school project. Nor do we have a situation where the Cuba Books were assigned to anyone for use in a regular scheduled course of study under the supervision of any faculty member. Therefore, there is no indicia of "curriculum" which bears the imprimatur of the school or the School District. The mere purchase of a few books which essentially remained on the library shelves over a period of several years can hardly be characterized as "curricular" or be argued to reasonably bear the imprimatur of the school.

In sum, I conclude that the book removal did not in fact occur in the context of a curricular activity. Even the School Board's Attorney advised the Board that the school library book in question was not "instructional material," but was "... more representative of books considered 'educational media.'" (Plaintiffs' Exhibit 12, April 28, 2006 memorandum, page 5).[29] This is an important

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[29] The School Board Rule recognizes that Library Media Centers are to contain a comprehensive collection of materials to, among other goals: (1) provide a broad background of information resources in all areas of knowledge; (2) support the general educational goals of the District and the objectives of specific courses, including materials that represent diverse points of view in order that young citizens may develop, under guidance, the practice of critical analysis of all media and intellectual integrity in forming judgments; and (3) meet the personal needs and interests of students. (Plaintiffs' Exhibit 6, page 21). It distinguishes Library Media Center materials from

admission which later-hired counsel for the School Board cannot now ignore. Now, after the fact, the School Board attempts, and poorly so, to argue that the books at issue are considered "Instructional Materials" which are an integral part of the curricular process. The mere fact that elementary **school libraries themselves** are used principally to further the curriculum and promote the importance of reading does not mean, without more, that maintaining a few copies of a book on a few library shelves is *per se* "curricular."[30] The Eleventh Circuit has held as much in *Virgil* by stating that materials are curricular if they are "used in a regularly scheduled course of study in the school," and thus the public might reasonably perceive that they "bear the imprimatur of the school." *Virgil,* 862

Instructional Materials. (Plaintiffs' Exhibits 11 and 12).

[30] The fact that school libraries, like all libraries, have educational value does not convert every book on the shelves of the school library into curricular texts. Even the School Board's defense witness, Alberto Pimienta, recognizes that library books "are also used to provide recreational reading materials." (Pimienta Affidavit, ¶ 5). The plurality opinion in *Pico* anticipated this argument. As the *Pico* plurality noted, the school board might well defend its claim of absolute discretion "in matters of *curriculum*.... But we think that [the Board's] reliance upon that duty is misplaced where, as here [it] attempts to extend [its] claim ...beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry." 457 U.S. at 869, 102 S.Ct. at 2809. *Accord Romano v. Harrington,* 725 F.Supp. 687, 690 (E.D. N.Y. 1989) ("pedagogic concerns allow educators to exercise more control over the content of students' required reading lists than over their voluntary, extra-curricular selections, even though the voluntary and required selections may exist side-by-side on the school library's shelf.").

F.2d at 1521. In discussing what is "curricular," the Eleventh Circuit, in *Virgil,* distinguished between textbooks used in the classrooms and "library books." The Court noted that the disputed materials in that case "have not been banned from the school" and "were available in the school library." *Id.* at 1525. In determining the authority of the school board to remove the curricular materials in the textbook, the Eleventh Circuit referred to the adaptions of *Lysistrata* and *The Miller's Tale* that were in the library, stating: "No student or teacher is *prohibited* from assigning or reading these works or discussing the themes contained therein in class or on school property." *Id.* (emphasis added).

Here, by totally banning the Cuba Books and the rest of the Series, the School Board is in fact prohibiting even the voluntary consideration of the themes contained in the books by students at their leisure. This goes to the heart of the First Amendment issue. Accordingly, for the reasons I have discussed, the situation here bears no relation to "curricular activity," as that term was discussed in *Hazelwood* and *Bannon.*[31] Therefore, I conclude, for preliminary injunction purposes, that the Cuba Books, and the rest of the books in the Series, are not part of any regular or organized school curriculum.[32]

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[31] In its debate, one School Board member said: "This is not a text book, this is a book in a library that a child may choose or not to take out of the library." [Exhibit 33, page 78].

[32] Similarly, in *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719 (2d Cir. 1994), the Second Circuit considered the use of a film clip by a guest lecturer in a mathematics class. The lecturer argued that "the disputed film clip falls within the heightened protection provided to library resources." With

Turning back to the School Board's argument regarding "Governmental Speech," I also find significant that the Eleventh Circuit, in *Bannon*, did not apply such a test in the broad manner advocated by the School Board. To have done so would have simply allowed "unbridled discretion" without any constitutional constraints. Instead, it applied the *Hazelwood* test, and also reconfirmed its position, as stated in *Searcey*, that "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based *on content*, we do not believe it offers any justification for allowing educators to discriminated based on *viewpoint*." *Bannon*, 387 F.3d at 1215 (citing to and quoting *Searcey*, 888 F.2d at 1325). The Eleventh Circuit explained that the school, in *Bannon*, "... did not engage in viewpoint discrimination, but rather censored the murals on the basis of their content." 387 F.3d at 1215. The Court reasoned that the message on the murals was inherently religious, which could not be recast as the discussion of secular topics from a religious perspective. *Id.* at 1216. The Court held that since the school did not permit any student in the context of a curricular activity to communicate such messages, it restricted speech on the basis of content,

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reasoning pertinent to this case, the Second Circuit rejected this argument, stating: "[T]he distinguishing factor between library resources and curriculum is that library resources are something that students voluntarily may view at their leisure, whereas curriculum is required material for students. Here the students were required to attend mathematics class, their teacher was present, and the purpose was to impart knowledge of how film making relates to mathematics." *Id.* at 723 (internal citations omitted).

not viewpoint. In contrast, as explained below, the School Board here was concerned with **viewpoint, not content,** that related to life in foreign countries. Accordingly, even under the more lenient *Hazelwood* standard, the School Board's action would be in violation of *Searcey* and *Bannon*.

Of interest, the School Board does not discuss this aspect of *Searcey* and *Bannon*. Instead, it argues that: "The case law is **deeply divided** as to whether *Hazelwood* requires 'view point neutral' restrictions, while admittedly permitting content-based distinctions, and the distinction between the former and later restraints is unclear." (Defendants' Initial Memorandum of Law in Opposition to Motion for Preliminary Injunction, page 13) (emphasis added). I conclude that the School Board is wrong. Even the case it relies on, *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), specifically recognized that the Eleventh Circuit has split from other circuits on the question of whether *Hazelwood* requires view-point neutrality. *Id.* at 615 n. 27. The case law is not unclear in the Eleventh Circuit[33] and the School Board is less than

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[33] The School Board appears to argue that it is not even bound by *Hazelwood* because the School Board's **selection** of elementary school library books is "government speech." (Defendants' Initial Memorandum of Law In Opposition to Motion for Preliminary Injunction, page 15). From this point-of-view, it appears to argue that First Amendment constraints do not apply when the Government engages in "Government Speech" because the Government is the literal speaker. In support, it cites *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005). The *Chiras* decision is not on point. The issue addressed was whether Chiras alleged a violation of **his** First Amendment rights as a textbook author when the board of education declined to place his textbook on the conforming or

nonconforming list of textbooks for use in public school classrooms. The Fifth Circuit stated that: "Although the Supreme Court has not answered this question directly, the Court has given us ample guidance to allow us to comfortably answer in the negative." *Id.* at 611. But, this case is not about the author of the Cuba Books attempting to compel the Miami-Dade School Board to place it as a "textbook" for use in elementary school classrooms as part of the curricula. It is about removing a non-curricular book from the school library shelves because the board members did not agree with its point-of-view. It is the Fifth Circuit's earlier case in *Campbell* that is important here, but the School Board choose not to discuss it.

None of the other Supreme Court cases cited by the School Board can be stretched as far as it suggests so as to abrogate the First Amendment by allowing school boards absolute discretion in removing library books because government funds were used in their original purchase or because a school board librarian initially approved their original purchase. None of the cases are factually on point. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) addressed a claim by an independent political candidate that a state-owned public television broadcaster excluded the candidate from a debate. *National Endowment for Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) upheld an art funding program that required the NEA to use content based criteria in making funding decisions. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) addressed claims that the Children's Internet Protection Act, which required public libraries to use internet filters as a condition for receipt of federal subsidies, violated the First Amendment. The Court found that public library staffs enjoy broad discretion in making "collection" decisions. Again, this case does not involve a "collection" decision. It involves a "removal" decision under a different set of School Board rules.

To argue that every volume on the shelves of a public school library bears the imprimatur of the school and is government speech is directly in conflict with First Amendment limitations. As the District of Columbia remarked in *PETA v. Gittens*, 414 F.3d 23, 38 (D.C. Cir. 2005), "Those who check out

candid with this Court in suggesting otherwise.[34]

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a Tolstoy or Dickens novel [from a public library] would not suppose they will be reading a government message." To argue that every book in the library bears a government-endorsed message is patently without merit. The logical extension of the School Board's argument is that it can remove each and every book in the school library for reasons rooted in political orthodoxy simply because a majority of the Board happens to disagree with a book's content-neutral message. It can do it simply because it had the original power to choose. This is precisely the political expungement that every Justice determined violated the First Amendment in *Pico*.

The principle applies equally to the School Board's argument under the "government funding" prong of its reasoning. Essentially, such an argument boils down to "because we bought the book, we have the unfettered discretion to decide to ban it." Such an ideologically-imposed straightjacket directly conflicts with established First Amendment case-law supporting free inquiry. *Keyishian*, 385 U.S. at 603, 87 S.Ct. at 683 (the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom.... The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (internal citations and quotations omitted).

[34] I reject the School Board's argument that the holding of the Fifth Circuit in *Campbell* was "superseded" by *Chiras v. Miller*. The cases analyze different school board actions. *Chiras* is a case about the authority of the Texas State Board of Education to select and approve *textbooks* for each subject and grade level in the Texas public school system. 432 F.3d at 608. The *Chiras* court did not reject *Campbell's* analysis in the school library setting. To the contrary, *Chiras* explained that "[b]ecause *Pico* addressed the removal of an optional book from the school library, not the *selection of a textbook for use in the classroom*, we decline to apply *Pico* to the facts before us." *Id.* at 619 (emphasis added). Once again, I am concerned that the School Board has been less than candid with the Court in its

In rejecting the School Board's arguments, I follow, in the absence of a binding Eleventh Circuit opinion, the Fifth Circuit's decision in *Campbell v. St. Tammany Parish School Board,* that: "Even though the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the School Board's removal decision was based on unconstitutional motives." 64 F.3d at 189. Confronted with the same issue in a library book removal setting, another district court, in *Case v. Unified School Dist. No. 233,* 908 F.Supp. 864 (D. Kan. 1995), recognized that the *Pico* decision is not binding precedent, but, applying the Fifth Circuit's rationale in *Campbell,* concluded (given the absence of Tenth Circuit precedent) that: "This is the only Supreme Court case dealing specifically with the removal of books from a public school library"... [and] "... it should follow the *Pico* decision in analyzing the Olathe School District's removal of *Annie on My Mind* from the District's libraries." *Id.* at 875.[35] In applying *Pico,* the District Court determined the "actual motivation" of the school board members in their removal decision. *Id.* The Court stated: "If the decisive factor behind the removal of *Annie on My Mind* was the school board members' personal disapproval of the ideas contained in the book, then under *Pico* the removal was unconstitutional." *Id.* The Board of Education members who voted in favor of the removal stated

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arguments.

[35] The School Board cites *Case* for standing purposes, but chooses to ignore the District Judge's First Amendment analysis, which is applicable here.

that they believed the book was "educationally unsuitable." *Id.* Accordingly, the District Judge determined: "The court is required to assess the 'credibility of [school officials'] justifications for their decision." *Id.* (citation to *Pico* omitted).

After a full trial, the district judge concluded that: "[T]here [was] no basis in the record to believe that these Board members meant by 'educational suitability' anything other than their own disagreement with the ideas expressed in the book" and "... the invocation of 'educational suitability' does nothing to counterbalance the overwhelming evidence of view-point discrimination." *Id.* The District Court concluded that the school board members removed the book because they disagreed with the idea expressed in it and that "... this factor was the substantial motivation in their removal decision," and that: "... Defendants unconstitutionally sought to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id.* at 876 (citations to *Pico* omitted). In reaching its conclusion, the District Court took into account: "[T]he highly irregular and erratic manner in which defendants removed *Annie on My Mind* from the District's libraries and their disregard of established policy and procedure [which] are important evidence of their improper motivation." *Id.* (citations to *Pico* omitted).

As discussed below, I follow and apply the District Judge's First Amendment analysis here. Under the guise of "Government Speech," the School Board essentially argues that it has broad discretion to transmit community values, and that it may

remove library books based upon their personal, social, political and moral views. The Supreme Court in *Pico* expressly rejected this argument, noting that "petitioners' reliance upon that duty (to transmit community values through curriculum) is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." *Pico,* 457 U.S. at 869, 102 S.Ct. at 2809.

The arguments now relied upon by the School Board are merely a pretext to provide constitutional cover for the impermissible actions taken. Allowing boards to engage in *post hoc* rationalizations for book-banning permits them to mask impermissibly motivated behavior by plausible but disingenuous justifications. The School Board tries to "bootstrap" itself, applying the *Hazelwood* test, that removal would be proper if the school library **selection** process was regarded as "school sponsored speech" because the replacement of such inaccurate books is "reasonably related to a legitimate pedagogical concern." But, we are not dealing here with library selection or student speech sponsored by the schools. Here, the invocation of these arguments does nothing to counterbalance the overwhelming evidence, for preliminary injunction purposes, of view-point discrimination whether under the *Pico* or *Searcey/Bannon* tests.

B. Preliminary Injunction Elements

1. Likelihood of Success on the Merits

Plaintiffs have advanced two basic theories in

their Amended Complaint—denial of First Amendment rights and denial of due process. With respect to the First Amendment, the Plaintiffs claim that the School Board's June 14, 2006 Order (the Order), Exhibit 15, directing that the Cuba Books, and the remaining books in the Series, be removed from all libraries within the Miami-Dade County Public School system violates Plaintiffs' First Amendment rights because: (1) it denies them access to information; (2) the removal decision was motivated the School Board and community disapproval of the contents of the books; and (3) the decision of the School Board to remove the books was not content and viewpoint neutral, as is required for removal in such a forum.

Plaintiffs then advance two separate due process claims. First, Plaintiffs claim that the Order denies them due process because it was directed to all 49 copies of the Cuba Books, including those contained in the 32 school libraries other than the Marjory Stoneman Douglas Elementary School, which was the only subject of the administrative proceedings in this matter. Second, Plaintiffs claim that the portion of the School Board's Order directed to the unspecified books "in the series [the Cuba Books are] apart of" were never the subject of an administrative proceedings. Plaintiffs claim that this portion of the Order is also overbroad and not the least restrictive means of accomplishing any compelling governmental interest. I first address the merit of Plaintiffs' First Amendment claims.

a. Plaintiffs' First Amendment Claims

Under the applicable case law, the School

Board may not remove non-curricular books from the school library shelves because a majority of the Board dislikes the ideas or the points-of-view contained in the books and seeks by their removal to prescribe what shall be orthodox in politics, nationalism, or other matters of opinion. For preliminary injunction purposes, I conclude, based on the greater weight of the more persuasive and credible evidence at the preliminary injunction hearing, that the majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision. In so acting, the School Board abused its discretion in a manner that violated the transcendent imperatives of the First Amendment.

The political orthodoxy evident from the record is the view held by a majority of School Board members concerning how life in contemporary Cuba should be portrayed in children's books regardless of the educational merit or the age appropriateness of the books. While the debate was couched in terms of "inaccuracies" contained in the Cuba Books, the real issue was that the Cuba Books were content-neutral and scrupulously apolitical, and did not reflect, as viewed by the majority of the School Board members, the true evil of Castro's government and the oppression of the Cuban people. Thus, the majority was significantly motivated to remove the books because of their disagreement with the content-neutral views expressed in the Cuba Books,

essentially the view that "People in Cuba eat, play and go to school *like you*." This statement, however, was apolitical and content-neutral. It was not limited to only the Cuba Books, but can be found, as well, in the Series books about a visit to Puerto Rico, Vietnam, Australia, China, Mexico, India, Ireland, Israel, Italy, Japan, Brazil, Egypt, France, Germany, Greece, and the United Kingdom. Therefore, the question arises, should School Board members who happen to emigrate from any of these countries to the United States be permitted to ban books in the Series because of their individual political orthodoxy and point-of-view of what is "true" for a child's life in one or more of those countries? The obvious answer under constitutional standards is "no." I conclude that the School Board's claim of "inaccuracies" is a guise and pretext for "political orthodoxy." The claim of "inaccuracies" goes to "omission" more than to incorrect or out-of-date assertions affecting educational suitability. Under the School Board's rules, a key component of "accuracy" is "objectivity."[36] The gist of the argument, however, is that the books were too objective and, therefore, should be banned.

The political orthodoxy at issue was best expressed by School Member Frank J. Bolaños, who was the main proponent of the removal. On April 18, 2006, in an effort to ban the books before the School Board Rule's review process was completed, he wrote

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[36] The criteria of "accuracy" under the School Board's rules means "[N]onfiction information is correct, recent, and objective." (Plaintiffs' Exhibit 12, Memorandum of the School Board Attorney, April 28, 2006, page 6).

to other School Board members that; "... *Vamos a Cuba* includes content and pictures [showing smiling children in uniforms] that erroneously depict life in Cuba. This book is hurtful and insulting to both our Cuban-American community and those Cubans still living on the island under oppressive conditions." [Plaintiffs' Exhibit 19].

The point-of-view in *¡Vamos a Cuba!* most offensive to Mr. Bolaños was that: "The people eat, work and study *like you.* Life in Cuba is also unique."(emphasis added). Mr. Bolaños characterized this statement as a "distortion" and stated: "Nothing can be more further than the truth." He wrote: "The people of Cuba survive without civil liberties and due process under the law and receive 10 to 20 year prison sentences for simply writing a document or voicing an opinion contrary to the party line. People are told where to work. They lose their job if they do not follow the dictates of the Communist Party. Children are indoctrinated and forced to chant Castro's greatness in class." *Id.*

As evidenced by a review of the transcripts of the public proceedings, Mr. Bolaños' statements were supported by other School Board members and by a number, but not all, of their constituents.[37] The

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[37] One of the affidavits filed in support of the Defendant was authored by Dr. Lydia M. Usategui, M.D. (Defendants' App. C). Dr. Usategui testified before the School Board on April 18, 2006 that *¡Vamos a Cuba!* should be banned because "the book tries to portray an image of normalcy with the theme of life growing up in Cuba as very similar to that in the U.S. This is grossly inaccurate and unacceptable." (April Transcript, 27:14-27:17). As Plaintiffs' expert, Dr. Lisandro Perez, stated by way of declaration: "The real offense of *Vamos a Cuba* for many Cuban

merit or truth of these statements is not the issue. Nothing written here is intended to cast doubt upon the heartfelt point-of-view expressed by Mr. Bolaños and his supporters. Tragically, that point-of-view is based on real life experiences that members of the Cuban Community and their families have painfully endured in Cuba before coming to this country, and which many who have remained continue to endure under an oppressive totalitarian regime. But, many have come to this nation, and continue to do so today, for the opportunity to live in freedom under the protection of our Constitution and Bill of Rights. The quintessential right of freedom of speech may not be sacrificed on the alter of beliefs no matter how firmly those beliefs are held. In this nation, we do not prohibit the expression of an idea simply because some in the community find it offensive or disagreeable. To ban books because of perceived inaccuracies sweeps too broadly. Too many works of literature could be removed from school libraries based on the degree of accuracy according to School Board members. To do so places at risk the very rights which make this nation great. As one person commented during the debates, "I fear we may become that which we constantly protest against...." [Exhibit 33, page 33].

In defense, the School Board asserts that what

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exiles is that it treats Cuba as if it were any other country. To present Cuba as a normal place is unacceptable to exiles because it negates the very reason for their exile and struggle....The adamant rejection of normalcy accounts for the strong desire to remove from the library shelves a book that treats Cuba as the same as any other country." (Plaintiffs' Exhibit 30, Declaration of Dr. Lisandro Perez, ¶ 9).

is involved is more than mere beliefs but pedagogical community values that it may protect and in which it has a legitimate and substantial community interest in promoting.[38] It points out its right, under its own rules, to determine the educational suitability of library books, especially those written for very young and impressionable elementary school students. No doubt this is true unless it becomes a pretext to justify imposing political orthodoxy and thereby exceeds constitutional limitations.

The duty of this Court is to scrutinize the record to determine which is the decisive factor and the substantial motivation for the School Board's Final Order. Indicia may be found both in the content of the debate and the means of its presentation. Even though the matter is only at the preliminary injunction stage, I am compelled to observe that, in light of the special role of the school library as a place where students may freely and voluntarily explore diverse ideas, the School Board's non-curricular decision to remove the Cuba Books well after they had been placed in only a few of the public school libraries evokes fundamental constitutional concerns. That possibility is enforced by the evidence indicating that the School Board's ultimate action was not to remove one book from one library where one parent raised an issue, but to remove all the Cuba Books from all the libraries and,

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[38] The School Board argues that the books were removed because they were "rife" with material omissions of basic facts and are so misleading as to present a false view of the countries as a matter of fact, that their removal would be justified even under Justice Brennan's "educational suitability" test.

of significant importance, to remove the remaining nineteen books in the Series when the evidence establishes without contradiction that none of these other books were subjected to the School Board's own review processes or were ever previously questioned on appeal, or were ever read by most of the School Board members prior to their vote.

The broad sweep of the School Board's action lends support to the Plaintiffs' argument that it was constitutionally infirm. The transcript of the hearing where the Board rejected the Committees' and Superintendent's findings is replete with examples of political decision-making based upon the politics of opposition to the Castro regime in Cuba.[39] One Board member, who voted against the removal of the books, said it this way: "The 22 professional educators who reviewed this books have affirmatively determined that this is not the case [that there were not 'serious, material, irrevocable and clear inaccuracies and biases'], therefore, we are here today in essentially a *political process,*"... and, "[w]e are rejecting the professional recommendation of our staff *based on political imperatives* that have been pressed upon members of this board,..." (Plaintiffs' Exhibit 34, pages 34:23-35: 15) (emphasis

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[39] In his memorandum of May 22, 2006 to the Deputy Superintendent Curriculum Instruction and School Improvement, the Superintendent of Schools stated: "I have listened carefully to the citizens who have come to address the School Board in April and in May, and have been struck by some disturbing signals of intolerance, which left unaddressed could threaten the progress and the harmony that has marked our community over the last decade. Divisive rhetoric only damages the fabric of our society."

added).

Significant weight must be given to the Board's failure to consider, much less adopt, the recommendations of the two previous committees, and that of the School Superintendent, to leave the Cuba Books on the library shelves because they were educationally suitable. These actions have the appearance of "the antithesis of those procedures that might tend to allay suspicions regarding the School Board's motivations." *Campbell,* 64 F.3d at 190-91 (citing *Pico,* 457 U.S. at 875, and *Keyishian,* 385 U.S. at 604-05 (observing that "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform ... what is being proscribed")).

To begin with, Mr. Bolaños' immediate desire was to circumvent the appeals process under the Board's own rules by immediately removing *Vamos a Cuba* not only from the school library at Marjory Stoneman Douglas Elementary School, but in all such libraries throughout the School District. He was joined at the Board's meeting held on April 18, 2006 by two other School Board members, one of whom compared the Cuba Books to "pornography" and "books about devil worship." The School Board Attorney warned the Board that such action would be subject to constitutional attack. The motion lost and the review process continued. Notwithstanding, when the matter returned to the School Board for final action, the same infirmity occurred when the Board ignored the advice of its attorney that: "... it was of vital importance that the procedures

established by Board Rule be followed strictly. Suspending the applicable Board Rule would not be an available option for the Board." (Exhibit 12, Memorandum of June 7, 2006, page 5). But that was exactly what the School Board did when it voted that the remaining books in the Series were to be replaced with a more "accurate set of books that is more representative of actual life in these countries." As noted, none of the other nineteen books in the Series were ever reviewed for accuracy by any requisite review committee or by the School Superintendent under the School Board's applicable rules. Nor did the SMRC or the DMRC consider whether their decision would impact **all** copies of the Cuba Books in **all** school libraries. The School Board patently ignored the legal advice of its own attorney as contained in the School Board Attorney's memorandum of June 7, 2006 to the School Board Members, which provided in applicable part:

> ... an issue raised by the DMRC, was whether the DMRC's decision impacted **all** copies of the book owned by the District. **The answer to this question is in the negative.** The DMRC merely reviewed the decision of the SMRC and the complaint of a parent from one school requesting that the book be removed from his child's school library. **There is no provision in the Rule for a district-wide removal of a school library book stemming from a DMRC review.** Although the Rule does not prohibit the Board from

> making a decision affecting the District as a whole, such District-wide impact would be more susceptible to legal challenge **because the Rule apparently contemplates independent school-by-school decisions regarding books.**

(Plaintiffs' Exhibit 12, Memorandum of June 7, 2005, page 5 n. 6) (emphasis added).

The official review process prior to the School Board's action focused on the accuracy of the Cuba Books and their educational suitability. While acknowledging the truth behind the concerns of members of the Cuban community, the essential issue debated by professionals and lay persons was whether a simple travel book for first and second graders was the proper place to discuss them, or put it another way, whether the omission of these concerns affected the educational suitability of the books. The vast majority of the professionals and lay people from throughout our community, as constituted on the SMRC and the DMRC, unequivocally said **no**. In their view, the Cuba Books were essentially apolitical, accurate and educationally suitable. I conclude that the greater weight of the more credible evidence, for preliminary injunction purposes, supports the educational suitability of the books.

The prior reviews of these committees were both thorough and extensive given the publicity surrounding the issues involved. As stated in the Facts section, the SMRC, consisting of nine professionals and lay people, was appointed by the

school principal to review the parent's complaint. Upon completing its review process pursuant to the School Board Rule, the SMRC voted 7 to 1 that the Book should remain a part of the school library's collection. (Plaintiffs' Exhibit 9). The parent appealed this decision. The Superintendent subsequently notified the Board of his intent to appoint a seventeen member committee (the DMRC), consisting of both professionals and lay people, as authorized by the School Board Rule. After several meetings, the DMRC[40] voted fifteen to one in favor of keeping the Cuba Books, which are part of a series of geography books written for 4-6 year old children. As noted in Plaintiffs' Exhibit 5, the DMRC considered the Books with special attention to five criteria: educational significance, appropriateness, accuracy, scope and special features. Much of the DMRC's dialogue centered on the issue of missing facts versus how much and what type of information is meant to

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[40] The members of the DMRC included a wide variety of professionals and lay people, including: the Regional Center Superintendent; the Principal of Lakeview Elementary School; the Principal of Coral Way K-8 Center; the Administrative Director of Instructional Technology, Instructional Materials, and Library Media Services; the Directors of Division of Social Sciences; the Instructional Supervisor of Language Arts; the Instructional Supervisor of Library and Media Services; a Reading Coach from Martin Luther King Elementary School; the Library Media Specialist from Phillis Wheatley Elementary School; the Library Media Specialist from Key Biscayne K-8 Center, a student from South Miami Senior High School; a designee from United Teachers of Dade; the President of the Dade County Council of Parent-Teacher/Parent-Teacher-Student Associations; a representative of the Florida House of Representatives; and the President of the Spanish American League Against Discrimination.

be contained in books for very young children.

The importance of these recommendations was told to the School Board by its attorney. The School Board Attorney admonished the Board that "... it is important for the Board to carefully and thoughtfully consider the recommendations of the DMRC and Superintendent's recommendations." (Plaintiff's Exhibit 12, June 7, 2006 Memorandum, page 7). The School Board Attorney stated: "... it is our opinion that deviation from the DMRC's decision, *especially in light of the extensive analysis and deliberations by the DMRC,* would most likely subject the Board to legal challenge." (*Id.* at page 8) (emphasis added).

The opinions expressed by the SMRC and the DMRC were supported by professionals who testified on Plaintiffs' behalf at the preliminary injunction hearing. I find their testimony more persuasive and convincing than other opinions offered by the Defendants' witnesses. The concern of these professionals was that the objections to the Cuba Books appear to be based on adults attempting to import an adult value system into a children's book. With regard to the claimed omissions and inaccuracies, I find credible the opinion of Ms. Antoinette Dunbar, the Chair of the DMRC, who testified at the evidentiary hearing that: "We did not perceive those to be omissions relative to the developmental level of the text, nor the intent and purpose of this as a text for this age child."

The more reasoned and convincing opinion of Plaintiffs' experts is that too much information of the kind at issue is cognitively more damaging to young

children than too little.[41] The professionals called by Plaintiffs testified that young children, the target audience of these books, would simply be unable to grasp the level of political thought implicit in Mr. Bolaños' documents. Several professionals concluded that such information would be detrimental to a child's understanding of the world at a very young age. In their view, including the kind of information advocated would make the books inappropriate for young children where the goal is simply to show a young child that other people in other cultures also eat, work and go to school like they do.[42] This idea and aspect of the Cuba Books was formulaic with the same outline and topics covered for each of the other nineteen other countries in the series. None of the Series Books exceeded thirty-two pages. It was

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[41] *Compare,* affidavit of Defendant's witness Lydia M. Usategui, M.D., stating that a problem with the Cuba Books "in this community" is that they "teach something that is different from what the children learn in their homes or from peers in their neighborhoods." The point appears to be that the schools should not have books on their library shelves which taint or cast a pall on such orthodoxy.

[42] Another expert for Plaintiffs opined that: "(1) the alleged inaccuracies or distortions of the book are either of little consequence or are not properly inaccuracies but based on different interpretations of the Cuban historical and cultural reality; (2) the alleged omissions are appropriate omissions given the age level and purpose for which the book is intended, and (3) the objections and level of outrage expressed by many residents of the community over the books cannot be understood by looking strictly at the inaccuracies and omissions, but rather must be understood within the broader ideological context of exile political culture that has a long history in Miami's Cuban exile community." (Plaintiffs' Exhibit 30).

neither the intent of the author nor publisher to discuss complex issues of government with respect to any of the countries. The Series Books, including the Cuba Books, were educationally suitable to show what people around the world share in common: they eat, sleep, go to school and play "like you." The emphasis was on things people share in common, not what divides and drives them apart.

In conclusion, it is the primary function of our schools to prepare their students for citizenship. Students will practice this "citizenship" in a country which prizes diversity and dissent. Hence, our schools must embody intellectual openness, lest they teach youth to discount important principles of our government as mere platitudes. The First Amendment ensures wide exposure to that robust exchange of ideas upon which the Nations' future depends. The School Board may not use its inherent power to expunge the expression of disfavored ideas.

b. Plaintiffs' Fourteenth Amendment Due Process Claims

Plaintiffs argue that the Final Order violates their due process rights in two ways: first, by banning the Cuba Books in all libraries within the School District, and second, by banning all of the books in the Series despite the fact that no school had received a complaint about any book other than the Cuba Books.[43]

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[43] In anticipation of the School Board's June 14, 2006 meeting, the School Board's own attorney cautioned that the matter arose following the DMRC and SMRC's review of a "complaint of a parent from **one school** requesting that the book be

The Fourteenth Amendment proscribes states from depriving "any person of life, liberty, or property, without due process of law...." Procedural due process rights, which are protected by the Fourteenth Amendment, arise in the context of agency decision-making whenever an agency decides not to follow one of its own rules. *Government of Canal Zone v. Brooks*, 427 F.2d 346, 347 (5th Cir. 1970) ("It is equally well established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it," but denying infringement of due process where deviation from established rule did not prejudice the plaintiff's rights in an adjudicative proceeding); *Campos v. I.N.S.*, 32 F.Supp.2d 1337, 1348 (S.D. Fla. 1998); *Courts v. Econ. Opportunity Auth. for Savannah-Chatham County Area, Inc.*, 451 F.Supp. 587, 591 (S.D. Ga. 1978). The School Board is an administrative agency pursuant to Chapter 120 of the Florida Statutes. Fla. Stat. 150.52 (defining agency to mean, *inter alia*, "board" or "educational unit," and "educational unit" includes local school districts); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So.2d 1194, 1196 (Fla. 1st DCA 1999) (describing Broward County School Board as an agency under Chapter 120, Florida Statutes). Defendants do not challenge any of these legal

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removed from his child's school library." (Plaintiffs' Exhibit 12) (emphasis added).

principles.[44]

Plaintiffs challenge the School Board's Final Order on the grounds that it ignores the requirements of the School Board Rule. The relevant portion of the School Board Rule, Section VIII, is entitled "Procedures for Consideration of Protests Concerning Instructional Materials and Educational Media." (Plaintiffs' Exhibit 6). It provides that, "[a]ny citizen may file a complaint with a school or the District concerning the use of particular curriculum materials, textbooks and ancillary items, library books, and nonprint media. **Challenged materials may be removed from use only after the following informal and formal due process procedures have been completed**...." (*Id.*) (emphasis added). The School Board Rule then goes on for more than three pages detailing the book challenge process, which includes a number of stages. (*Id.*). The first stage is labeled "School Level-Informal Complaint." (*Id.*). This stage requires that the complainant meet with the school principal, who will either personally or through a designee explain the school's library selection procedures and the role of the challenged book in the library's collection. (*Id.*). If the complainant is not satisfied, he may proceed to the second stage, labeled "School Level-Formal Complaint." (*Id.*). That stage requires the principal to appoint a nine-member committee (the SMRC) to review the challenged book. (*Id.*). The complainant then has the option of proceeding to the

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[44] At the preliminary injunction hearing, counsel for Defendants' acknowledged the merit behind all of these legal principles.

third stage, "District Level-Formal Appeal," where the book will be reviewed by a seventeen-member committee (the DMRC) appointed by the Superintendent and chaired by the Deputy Superintendent of Education or a designee. (*Id.*). That committee transmits its decision to the Superintendent, who rules on the merit of the challenge. (*Id.*). The final step for the complaining party to take is to "appeal the decision of the Superintendent to the School Board in writing and [ ] request an appearance before the Board...."(*Id.*).

Plaintiffs' first alleged deprivation of due process occurred when the School Board removed the Cuba Books from every library in the School District even though the complaining parent's child attended Marjory Stoneman Douglas and there was no complaint by a parent with a child in any other school. This decision, Plaintiffs maintain, violates the School Board Rule's pronouncement that removal of challenged materials may only follow completion of the informal and formal grievance process outlined at length therein. Plaintiffs' second alleged deprivation stems from the School Board's decision to remove all books in the Series. This action violates the School Board's Rule, Plaintiffs contend, because apart from the Cuba Books, no other books in the Series were put through the administrative review process.

Defendants assert that the School Board did not violate any of its rules because there is no rule "prohibiting [the School Board] from ordering a district-wide removal of a book *or* ordering a district-wide removal of an entire series of books."

As I previously mentioned, the School Board's most recent position before this Court is directly contrary to the opinion of its own attorney, which was provided to the School Board in writing on June 7, 2006. (Plaintiffs' Exhibit 12). It is important to reiterate that same point in the due process context.

The School Board Attorney directly advised the School Board that the DMRC's decision **did not** impact all copies of the book owned by the School District. (Plaintiffs' Exhibit 12, n. 6). The School Board Attorney stated that there is no provision in the school Board Rule for a district-wide removal of a school library book stemming from a DMRC review. (*Id.*). Instead, the School Board Attorney stated that, "it is of vital importance that the procedures, established by Board Rule be followed **strictly. Suspending the applicable Board Rule would not be an available option to the Board.**" (*Id.* at p. 5) (emphasis added).

In a manner applicable to the legal issue here, the School Board Attorney stated, and I concur:

> The courts and Division of Administrative Hearings have held that agencies, including school boards, are required to follow and apply their own rules. *See, e.g., Fredericks v. School Bd. of Monroe County,* 307 So.2d 463 (Fla. 3d DCA 1975) ("As a public agency, the School Board is bound to fully comply with its own rules and policies."); *Vantage Healthcare Corporation v. Agency for Health Care Administration,* 687 So.2d 306, 307 (Fla. 1st DCA 1997)

> (an agency statement that does not follow its own rules *is itself an invalid rule*); *St. Johns River Water Management District v. Modem Inc.*, Case Nos. 97-4389, 97-4390, 97-4391, 97-4392 and 97-4393 (DOAH 1999) (It is clear that "[a]n agency is not free to deviate from a valid existing rule....An agency must follow its own rules."). A change in the procedure that is currently set forth expressed in an adopted rule must be undertaken by rulemaking. *Cleveland Clinic Florida Hospital v. Agency for Health Care Administration,* 679 So.2d 1237, 1241 (Fla. 1st DCA 1996). For these reasons, we recommend that the Board not attempt to somehow suspend or waive its Board Rules.

(*Id.*) (internal footnote omitted).

Apart from deviating from the attorney's advice, the School Board's most recent position relies upon faulty logic. To begin, Defendants improperly characterize the focus of Plaintiffs' due process challenge by emphasizing the fact that the School Board Rule does not address the procedure for the School Board to use in evaluating a book challenge. Defendants miss the point. Plaintiffs challenge the fact that the School Board essentially rendered a ruling on two issues that did not work themselves through the administrative process, namely (1) the propriety of the Cuba Books in school libraries other than Marjory Stoneman Elementary School; and (2)

the propriety of other books in the Series in all of the libraries within the School District. In order for me to find that the School Board has unfettered discretion to take any action it pleases because the School Board Rule does not say otherwise, I would be forced to ignore the exceptionally detailed review process that precedes the School Board's consideration of challenged materials. Such a conclusion is not only unsupported by legal authority, but completely illogical.

Defendants also emphasize the fact that one of the options the SRMC could consider in addressing the Cuba Books is removing it from "the total school environment." However, Defendants' review of the Cuba Book stemmed from one complaint raised by one parent at Marjory Stoneman Douglas Elementary School. Therefore, the School Board could only review removal of those books from that particular school.

The "total school environment" language is equally useless as a justification for the School Board's decision to remove the remaining books in the Series despite Defendants' argument that the Cuba Books are representative of the entire Series and it would defy logic to require a full analysis of each book before the Series can be removed district-wide. For one thing, the record does not establish that the School Board made any finding that the Cuba Books were representative of other books in the Series, assuming this were even a relevant fact-which it is not. It is clear from the record that the only body to review the other books in the Series at all was the DMRC, and as Mrs. Dunbar testified at

length, that committee's review was limited to a comparison of those books with the Cuba Books to see whether all of the books in the Series featured structural similarities. Although the DMRC discussed whether the information presented in all of the books in the Series, including the Cuba books, was presented in a formulaic manner, the purpose of such a comparison was to further the DMRC's assessment of the **Cuba Books only**. Ms. Dunbar testified that the DMRC was not responsible for determining whether books in the Series other than the Cuba Books should be removed from the School District. The DMRC was not charged with considering the appropriateness of other books in the Series, it did not make any recommendations regarding these other books, nor was it asked to make any such recommendations. Moreover, the record is clear that the School Board itself never reviewed the other books in the Series before removing them from all the schools in the School District.

Again, an interpretation of the School Board Rule in the manner desired by Defendants would require me to ignore the fundamental structure of the School Board Rule which encourages several stages of local review before the School Board may consider challenged materials. Indeed, followed to its eventual conclusion, the School Board's interpretation of the School Board Rule is that, anytime it considers a book to fall outside the parameters for inclusion in the school libraries, for any reason, it may suspend the book review process and ban the book district-wide.

The School Board Rule is unambiguous about the process that a parent can utilize to challenge a book in the child's school library. Even if that process is somewhat burdensome in requiring individual reviews at each of the schools in the School District, that is the rule established by the School Board and thus it must be followed. *Sheck*, 530 F.Supp. at 691 (in enjoining banning of library book, noting that "[a]dherence to established procedures is essential to prevent the kind of arbitrary action that is inherent in the violation by a governmental agency of its own rules."); *Salvail v. Nashua Bd. of Educ.*, 469 F.Supp. 1269, 1273 (D. N.H. 1979) ("The Court finds and rules that, having adopted such 'interim guidelines', the Board was required to follow them in its attempts at removal of MS magazine from the shelves of the high school library.").[45]

Finally, this is not an instance in which the School Board should employ its inherent ability to relax its own rules, as in *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970). The Court in *American Farm Lines* authorized the Interstate Commerce Commission to relax its rules regarding submission of certain paperwork before granting the appellant

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[45] I note that *Case v. Unified Sch. Dist. No. 223* stands for the proposition that a school board's failure to follow its own rules in a book removal case does not amount to a violation of due process. 908 F.Supp. 864, 876 (D. Kan. 1995). This proposition directly contravenes the authority in this Circuit that an agency must follow its own rules in order to avoid infringing due process rights. *See Brooks, Campos,* and *Courts, supra.* As I mentioned earlier, I decline to apply the reasoning in *Case* to Plaintiffs' procedural due process claims.

application for temporary operating authority given the urgency of facts surrounding the relief requested. *Id.* at 538-39, 90 S.Ct. at 1292. Importantly, in that case, the Court noted that the agency's decision did not cause prejudice to those wishing to object to that relief. *Id.* at 538, 90 S.Ct. at 1292. The facts of that case are distinguishable from those at issue here. Clearly, the School Board's decision to ban the Cuba Books and all other books in the Series in all schools without a review process caused extreme prejudice to those who might object to that removal. Parents with children at other elementary, middle, and high schools could not object to the removal of the Cuba Books, and no one had the opportunity to object to the removal of the entire Series from the School District. The facts of this case do not present the sort of technical grounds that sometimes condone an agency relaxing its own rules.

To summarize, Plaintiffs have demonstrated that they are likely to succeed on the merits of their First and Fourteenth Amendment claims against Defendants. Therefore, I will now turn to the remaining elements required for entry of injunctive relief.

2. Irreparable Harm

I begin my consideration of this element with due regard for the fact that, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976); *Calvary Chapel Church, Inc. v. Broward County*, 299 F.Supp.2d 1295, 1305 (S.D. Fla. 2003); *CBS Inc. v. Smith*, 681 F.Supp. 794, 805 (S.D. Fla.

1988) ("This Circuit has held that the loss of First Amendment rights, even for a brief period, causes irreparable harm") (citing *Cate v. Oldham,* 707 F.2d 1176, 1188 (11th Cir. 1983)); *Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981); *Northeastern Florida Chapter of Ass'n of Gen. Contractors v. City of Jacksonville,* 896 F.2d 1283, 1285-86 (11th Cir. 1990) (distinguishing the *Cate* and *Deerfield* opinions as cases where, given the 'intangible nature' of the violations alleged therein, monetary damages were insufficient compensation).

In *Sheck v. Baileyville Sch. Comm.,* 530 F.Supp. 679, 684 (D. Me. 1982), the court held that the removal of a book from the school library for reasons of objectionable language posed an irreparable threat to students' rights under the First and Fourteenth Amendments. Such threat meant that the students were likely to suffer irreparable injury before a decision on the merits could be reached, thereby satisfying the first requirement for a preliminary injunction. *Id.*

Plaintiffs argue that if the School Board's Final Order is allowed to stand, then students returning to school on August 14, 2006 will not have access to the Cuba Books and other books in the Series. In fact, students currently attending summer school cannot check out any of the Series Books because the School Board has removed them from all elementary, middle, and high schools in the School District. Plaintiffs insist that the removal of the Series Books from the school libraries, making them unavailable to students currently enrolled in summer school, and to those students who return to

school on August 14, 2006, constitutes irreparable harm. I agree. Until the School Board's Final Order is addressed, students browsing in the school libraries will not be able to locate, read, and/or check out the Series Books from their school libraries at their leisure. This is harm of an irreparable nature because it cannot be remedied by money damages. To summarize, the ongoing interferences with Plaintiffs' constitutional rights amount to irreparable harm.

Defendants respond that there is no threat of irreparable harm to Plaintiffs because Plaintiffs have no First Amendment "right of access" to the Cuba Books, the government can constitutionally restrict access to information under its purview, the removal was protected "Government Speech," the Cuba Books lack "educational suitability," and the School Board's decision related to the valid pedagogical concern of preventing the dissemination of misleading information in children's books. All of these issues have been considered, and rejected, in my analysis on likelihood of success on the merits. Plaintiffs adequately state a fear of irreparable harm to their constitutional rights. This element is satisfied.

3. Balance of Harms

Plaintiffs also state that the irreparable harm they face is greater than the harm that would follow if injunctive relief were entered. This element is often compared against the likelihood of success on the merits to the extent that if the harm facing the plaintiff is extremely significant, then the plaintiff has an easier burden to demonstrate likely success. *Canal Auth. of State of Fla. v. Callaway,* 489 F.2d 567, 576 (5th Cir.1974). In this case, there is no need

to devote much time to the issue because Defendants merely state that, given their reasons that irreparable harm to Plaintiffs is lacking, the harm they face through entry of injunctive relief (presumably, interference with "government speech," a position I rejected above) satisfies this element in full. As explained above, Plaintiffs currently suffer, will continue to suffer irreparable harm to their constitutionally-guaranteed rights, and I find that that harm outweighs any supposed threat of injury to Defendants. The Cuba Books have been in libraries within the School District since 2001. Keeping them there pending a full decision on the merits poses no readily obvious harm to Defendants' interests, let alone a harm that rises to the level of infringement of constitutional rights. Since Defendants fail to present any similarly important right at stake on the balance of harms question, I conclude that the balance weighs heavily in Plaintiffs' favor. *Sheck*, 530 F.Supp. at 684 (declaring that the balance of harms favored the parent who challenged removal of the objectionable book in light of the fact that the defendants identified "no qualitatively-comparable right of their own which would be adversely affected by restoring [the book] to the library pending a decision on the merits.").

4. Public Interest

The final hurdle for Plaintiffs to overcome before injunctive relief follows is that the public interest will not be harmed through entry of an injunction. Clearly, my initial consideration of whether Plaintiffs' constitutional rights are to be continually infringed is not adverse to the public

interest. *American Civil Liberties Union of Georgia v. Miller*, 977 F.Supp. 1228, 1235 (N.D. Ga. 1997) ("'[n]o long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech'") (quoting *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 851 (E.D. Pa. 1996)). Indeed, such action serves a number of fundamental purposes for which this Court conducts its business. It is a forum to address the significant and competing public policies at issue. *Sheck*, 530 F.Supp. at 693. It safeguards against continued and potentially broadened infringement of individual liberties. *Id.* It defines the limitations that government may put on one of the most unique and important sources of First Amendment rights for children, school libraries. *Pico*, 457 U.S. at 868, 102 S.Ct. at 2809.

Defendants state only that the public interest is disserved by this Court's meddling with the affairs of a local school board. "Clearly, the public interest would not be served by having a federal court decide whether geography books have so many inaccuracies, misleading statements, and omissions that they should be removed from the school libraries." (Defendants' Response to Plaintiffs' Supplemental Memorandum on Certain Preliminary Injunction Elements, p. 9). I disagree. Protecting fundamental constitutional rights is not judicial "meddling." Rather, it is the sworn obligation of this Court to preserve and protect those rights from abridgement.

Accordingly, for all of the reasons stated above, it is hereby **ORDERED AND ADJUDGED**:

1. Plaintiffs' Motion for A Preliminary

Injunction (converted from Emergency Motion for Temporary Restraining Order) **[DE 17]** is **GRANTED**.

2. Defendants are **ENJOINED** from enforcing the terms of the School Board's Final Order entered June 14, 2006. Defendants are **ORDERED** to immediately replace the Cuba Books, as well as all other books in the Series, on the library shelves in the schools identified in Plaintiffs' Exhibit 44.

3. Defendants shall file a notice of their compliance with the terms of this Order **on or before July 24, 2006.**

4. Defendants' Motion to Dismiss the Complaint is **DENIED AS MOOT [DE 31]** given the filing of the First Amended Complaint.

5. The parties shall comply with any further orders of this Court establishing procedures and setting a date for a final hearing in this matter.

DONE AND ORDERED in Chambers at Miami, Florida, this 24 day of July, 2006.

/s Alan S. Gold
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

Copies furnished to:
U.S. Magistrate Judge William C. Turnoff
All counsel of Record

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.: 06-14633-GG

FILED
MARCH 27, 2009

AMERICAN CIVIL LIBERTIES
UNION OF FLORIDA, INCORPORATED,
MIAMI-DADE COUNTY STUDENT
GOVERNMENT ASSOCIATION,

Plaintiffs-Appellees,

versus

MIAMI-DADE COUNTY SCHOOL BOARD,
RUDOLPH F. CREW,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: CARNES and WILSON, Circuit Judges, and WALTER, *District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s Ed Carnes

UNITED STATES CIRCUIT JUDGE

*Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

ORD-42
(2/05)